CHAPTER I

INTRODUCTION

I. THE OBJECT OF POLITICAL THEORY

POLITICAL Theory is the science of the State; its function is to trace and ascertain the origin, nature, and forms of the State. The question at once arises: what, then, is the relationship of this branch of scientific inquiry to constitutional law, which is also concerned with the mutual relationship of the State and its institutions? The answer is that political theory deals with the State from a different point of view from that of positive constitutional law. While the science of positive constitutional law investigates some definite constitution, e.g. that of the Netherlands, of Great Britain, of the U.S.A., of France, of Switzerland, or of Germany, and thus attempts to analyse and explain the origin, development, and structure of a *particular* system, political theory focuses its interest on the genus 'State' in general and investigates its *general* features and characteristics.

The phenomenon of an inquiry into a given subject thus as it were branching out into different directions is a common one, and occurs in the cases of sciences of very different kinds. When a science has reached a certain stage in its development, the student conducting the research is able to turn his attention to the general character of the facts he is trying to investigate; he can then examine these facts with an eye to the uniformities they exhibit and the common features they display. Or he may, on the other hand, turn his attention to the different forms in which those common features manifest themselves. His choice may be due to personal preference: one student has a theoretical,

POLITICAL THEORY

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did not find this too easy). Conditions were very different from those which obtain to-day; since Locke's time international intercourse has grown enormously, and this has increased the need for the conduct of one group to another to be open to prediction, and consequently for rules governing that conduct; and, by the same token, the need for organized force and international justice. So it is not surprising that Locke omitted to notice any distinction between the functions of public international law and international justice.

We may conclude that a distinction of functions can be made in the manner indicated. But from this we learn nothing about the organs through which they are exercised. Both Locke and Montesquieu make the same terminological mistake of failing to distinguish properly between function and organ; they use the same word, 'power' (*pouvoir*), to express both. This is a very common mistake, and one which is fairly frequent in ordinary language, as witness the use of such words as 'authority', 'government', 'executive', 'administration', &c., to express both function and organ.

This usage, and the defect in terminology, have been the cause of a great deal of misunderstanding and confusion both in the realm of theory and in that of practice. Function and organ have been regarded as inseparably united and covered by the word 'power'; it has been thought that an exclusive, inalienable right to exercise the function was a necessary incident of the organ. But in fact it is not a necessary incident; it is quite possible for all three functions to be exercised by one single organ.

Nevertheless, experience showed that the specific character of each function made it essential that the organs exercising them should each satisfy particular requirements as regards its constitution. The exercise of all three

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another a practical, turn of mind; or it may be due to the course taken by previous research in the subject, or to circumstances which are, comparatively speaking, matters of chance—practical considerations or the requirements of the educational body to which the inquirer belongs. In the course of the growth and development of an inter-related group of investigations it is often found desirable, useful, or even necessary to conduct researches of one kind separately from those of another; separate subjects of study then come into being.

This division of labour in scientific investigation must not be taken to be such that any student can work exclusively either in one branch or in the other throughout. On the contrary, not a single student can afford to dispense with knowledge of the results obtained by both branches of the inquiry. This can be seen if, for instance, we consider the relationship between physics on the one hand and astronomy on the other, or between general psychology and more particular psychological investigations. Study of the geology of the Netherlands unaided by general geological knowledge will not yield results. And knowledge of political theory is simply indispensable to the student of the science of constitutional law. But in the present state of legal studies and higher legal education—the curriculum being largely determined by practical requirements—this knowledge is limited, in the case of most lawyers, to what they learn about it by way of introduction to constitutional law. All text-books on constitutional law contain some general observations on political theory, some quite a number; more than half of a book like Duguit's *Traité de Droit Constitutionnel* is concerned with questions belonging to political science. For the scientific treatment and sound understanding of a particular system, e.g. the State of

the Netherlands, some knowledge of political theory is, especially in view of the present stage reached in regard to the great problems of method, indispensable; failing this, the science of constitutional law becomes purely descriptive in character.

Now the questions which are introductory to the study of positive constitutional law and are conditions of its further prosecution constitute the actual subject-matter of political theory. Political theory focuses its attention on the general problems which arise in connexion with the State and its organization, and attempts their solution. The attempt is not new.

2. OLDER THEORIES

A. *Theocratic Theories.*

The name political theory, as descriptive of a separate branch of scientific study, is comparatively new, but the subject itself has a long history. Ever since the human mind began to reflect it has been much intrigued by the fact that man lives in groups and communities, and that in those communities one man (or a group of several men) is another man's master. The existence of *authority* has always attracted the attention of thoughtful minds; which is reasonable, for our most immediate and most important interests have been and are governed by authority. Now what *is* this authority and how did it originate? 'L'homme est né libre et partout il est dans les fers' is the *cri du cœur* with which Rousseau began his famous treatise on political science, *Du Contrat Social.*

An answer which readily suggests itself is that the supernatural powers or power have or has so willed it, that the gods instituted this authority. In accordance with this the origins of ruling families are traced to the gods; the mighty

conqueror Alexander is declared to be a son of Zeus Ammon. But such an expedient simply shifts the problem or, in reality, declares it to be incapable of scientific solution. The will of the gods, the dispensation of the supernatural power, is inscrutable to men; it is for them to accept that will, though they do not understand it, and to submit to it; existing authority, emanating as it does from the will of the gods, is to be obeyed.

In the course of time this view turned out to be hardly tenable. It led to irreconcilable conflicts of theory and to considerable difficulties of a practical nature whenever two authorities fell foul of one another, e.g. in the case of foreign war, or of a successful or semi-successful revolution. It is the will of the supernatural power that the power established on earth be obeyed, but who *is* the established power? Is it the fortunate conqueror or the successful revolutionary rather than the ex-ruler or the ancient dynasty which, according to tradition, had had authority assigned to it by the supernatural powers, with visible, tangible signs of special favour? Was that tradition trustworthy? Might it perhaps be founded on deception? Could it be that the hitherto reigning dynasty had forfeited the divine favour by its unrighteous and godless conduct? And what was the position when, as sometimes happened, the established authority prescribed rules of conduct which were in conflict with the express will of the supernatural power, as revealed through other channels? Thou shalt obey the power established on earth, we are told in Romans xiii. 1 and 2; true, but thou shalt also obey God rather than man, says the Gospel itself. And what if authority is distributed among different bodies, such as a king and a parliament?

In the more complex forms of the theocratic theory which appear in the course of the further development of political

theory the idea of a *direct* revelation of God's will that a particular person or a particular family should be invested with *the* authority, as for example in the case of the anointing of Saul by the prophet of God, was abandoned as a matter of course. It was seen that direct and outward signs of God's will were lacking. To find for authority a divine origin, reference was now made to history, to the course of events, or to 'facts'. 'The sovereignty of the House of Orange', says a Dutch writer,[1] 'simply sprang from the facts themselves.'

The question naturally follows: are facts thus authoritative? Can any one prove by reference to history which authority can invoke what is called 'God's dispensation'? This doctrine likewise fails to escape the difficulties which face theocratic political theory in its more primitive form. After all, if our aim is not merely to describe what actually happens, but further to analyse and justify it, we learn no more from the theory before us than is contained in the abstract idea that established authority has a divine basis; for what history shows is that authority arises in different ways. We can see this if we consider the views of the foremost and best-known exponent of theocratic political theory of modern times, Friedrich Julius Stahl. In his principal work[2] he devotes a separate chapter to the 'Genesis of the State and the basis of the duty of the subject'. 'In the case of a specific people inhabiting a specific territory', he says, 'the genesis of the State comes about first through historical occurrences—that is to say, through the circumstances into which men have been brought by their descent,

[1] A. F. de Savornin Lohman, *Onze Constitutie*, 3rd ed., Utrecht, 1920, p. 41.

[2] Friedrich Julius Stahl, *Die Philosophie des Rechts*, Zweiter Band: *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, 5th ed., Tübingen—Leipzig, 1878, p. 169 et seq.

their needs, their destiny and their actions; and secondly, through their moral and legal outlook at the time of those occurrences. Its origin is not to be traced to external pressure but to internal development, and should not be ascribed to human purpose but to a higher dispensation.' And he then announces, following Aristotle, that the first state was the ordered patriarchal family. This, as it were, contains the germs of those relationships which are later to develop separate existences: family, class, State, church. Then the family expands into a nation and in so doing parts with the advantages of birth; provision for the traditional worship of the deity, at a later period public external defence, and the taking of measures for maintaining the peace, are accompanied by the introduction of a relationship of respect and dependence. Conquest and subjection are followed by mastery and obedience. So supreme power results from birth, ability, and superior force; and acquiescence arises partly from gradual habituation, partly from voluntary submission, partly from conquest by force of arms. But along with all these events and circumstances there is present the human instinct to establish and maintain a system of this kind, and it is this which leads to the comprehensive and well-established institution which we call a 'State'. Such are the causes by which states came into being, in various ways and by gradual processes.

This short sketch of Stahl's touches upon several points which are of undoubted importance in the matter of the formation of states; but they are quite inadequately analysed and entirely unsystematically arranged. We shall have to return to them, each in its proper place, later on.

For our present purposes all that matters is that Stahl merely gives a short survey of the causes by which states are

brought into being everywhere, i.e. of the genesis of state authority in the abstract, a survey which for that matter is mainly sociological in nature and indeed of a fairly elementary sociological character. This process of cause and effect is then invested with divine sanction. But this leaves unsolved the same problems as did theocratic political theory in its elementary form, and in particular this outstanding problem: when several organized powers are brought into being by historical causes and they come into conflict, which of them can legitimately invoke the 'higher dispensation'? Stahl's theory provides no answer to this question. He does, indeed, assert, in sect. 46: 'The State *is justified in binding* its members because it has actually arisen. Its claim to authority rests on its mere existence as such',[1] but this is an entirely arbitrary pronouncement, a *petitio principii*. In it Stahl commits the fundamental logical fallacy of basing a conclusion as to objective value on personal standards, and thus failing to distinguish adequately between fact and principle. So that the theocratic explanation is also unsatisfactory in its more developed form.

Even in the splendid early period of Western thought the human mind was not content to leave the attempt to solve the problem at this point. Doubt as to the divinity of the established powers could not be suppressed; the problem was, and continued to be mooted as, a *scientific question*; mere invocation of the divine will did not dispose of the matter. Neither the Sophists, nor Plato, nor Aristotle were content to leave it at that. The problem appeared in literature as the cause of a tragic conflict. Antigone, for example, represents the struggle between authority and the divine dictates of conscience.

[1] Op. cit., p. 171.

B. *Natural Law Theories.*

Here again we have an example of what one so often comes across in the history of human thought, the tendency of the human mind to make straight for the essence of what it is examining and in so doing to set up explanatory hypotheses all too quickly. The failure of this school, to put it briefly, rested on the fact that it employed too much deductive and too little inductive reasoning. Speculation as to the 'nature of the State' was indulged in, and in the course of that speculation the attempt was made to explain that nature by reference to a general proposition, and by arguing from that proposition various conclusions were reached.

The starting-point was man in the abstract, man considered apart from the State. Such a beginning seems quite proper. For in searching for the origin of the State, it was obviously wrong to start from the existence of the State. So man without the tie of state allegiance was the starting-point, man in a free or natural condition. In order properly to understand the principles governing the institutions of law and the State 'il faut considérer l'homme *avant* l'établissement des sociétés' as Montesquieu put it in his *L'Esprit des Lois*. If we look at the matter from this point of view the problem automatically arises: how then did man, being in that natural condition, come to pass into the position of membership of a state? What can explain the creation of an organization and the consequent surrender of man's natural freedom and the forging of bonds to fetter his movements?

Two solutions readily suggest themselves and have frequently been put forward in various guises. The first is this: the remarkable phenomenon in question is to be explained by the fact that men in their natural condition perceived, by their reason, that complete freedom and

independence on the part of individuals carried with it the possibility of threats to every man's life, to say nothing of menaces to the peaceful possession of the goods and chattels which he and his had acquired by their labour. Created as rational beings, men realized by their intelligence that if they wished to put an end to the dangers which constantly faced them, it was expedient, and indeed necessary and inevitable, that they should bind themselves together, and unite for the purpose of creating an organized power. In this way those dangers might be removed and every man be protected in his person and his property by joint forces. Just as at the present day when men feel anxious about their personal security and the security of their property, and consider the way in which the public service known as the police discharges its functions inefficient, a society or company is formed, or in other words a contract is entered into for the creation and maintenance of a private watch service, so did men in their original condition, when there was as yet no 'State' at all and therefore no public protection service, unite with their kind and conclude a contract for mutual security. They thus deliberately formed a 'body politic', a corporation or *State*. And because the object, namely security of life and safety of property, could not be achieved unless the new institution were in a sovereign position, the power to give orders was assumed and 'authority' thus arose. Just as the Pilgrim Fathers on the *Mayflower* entered into an agreement, before landing, to elect magistrates, whom they should obey, for the promotion of mutual security and peace,[1] so, according to this hypothesis, did

[1] A similar agreement to create 'authority' is to be found in the following resolution passed by a party of South African 'voortrekkers' on the 2nd December 1836: 'It was this day resolved in general meeting to appoint Judges by a general election, the Judges to promote the common

the same thing happen in the original condition of mankind.

This is, I think, a reasonable and plausible hypothesis. It is most clearly and consistently expounded by the logical genius of Hobbes in his treatises *De Cive* and *Leviathan*. Fear, he argues, is the most powerful motive in human consciousness and it is therefore fear which drives men to form states and governments. In their natural condition men are unsafe; one man is a dangerous beast of prey to another: *homo homini lupus*. To escape that fear, to render that dangerous beast, their fellow creature, harmless, they must curb him, and to achieve that object they agree to form the restrictive agency of a state and bring into being a sovereign authority.

It was not only Hobbes who set out from the hypothesis of an agreement to form a state; a number of other thinkers held the same view: for example, Grotius, Althusius, Locke, Montesquieu, Rousseau. The idea of a social contract is the explanation normally offered of the origin of the State by upholders of the doctrine of natural law. The opening words of the sixth chapter of Rousseau's *Du Contrat Social* are significant: 'I am making the supposi-

welfare and maintain the peace, and at the same time to constitute a Legislative Body, which Corporation or Body shall consist of the following seven persons [here follow the names], who are all elected by the undersigned as a form of government which henceforth from time to time will strictly observe all such Laws and Ordinances as shall be passed in general meeting. Their Honours having undertaken to promise on their solemn oaths to administer impartially according to the best of their ability and to suffer none but the purest Justice, both in civil and in criminal matters and likewise in all matters which concern warfare; the Common People who constitute the Nation have for their part likewise promised on oath faithfully and peacefully to submit to the judgement and decrees of the above-named Leaders.' See Gustav S. Preller, *Voortrekkermensen: 'n Vijftal Dokumente oor die Geschiedenis van die Voortrek*, Cape Town and Bloemfontein, 1918, p. 297, Appendix I.

tion that men have reached a point at which the obstructive elements injurious to their preservation in the state of nature are able to conquer the forces which each individual can bring to bear to maintain himself in this state. It follows that the existence of this primitive state is terminated; and the human race would perish if it did not alter its way of living. Now men cannot create new forces; they can only unite, and give direction to, those which already exist, and therefore the only measure open to them to preserve themselves is to pool their forces and thus overcome the resistance offered, to bring this joint power into play under a single initiative, and to make it act as a unit.'

The theory we are considering is one which, to be honest, strikes us as most acceptable at first sight, and incidentally one which, in one form or another, has for centuries exercised more influence than any other on the world of jurisprudence. Indeed, it is probable that the hypothesis of a state of nature followed by a contract to form a society has wielded almost as much authority in the science of law as did Newton's doctrines in physical science.

Nevertheless, as time went on it was found that this hypothesis would not work after all. The unfortunate thing was that in arguing from the fundamental proposition different inquirers reached totally different results, according as each took up some slightly different point of view or assumed some slightly different object for the contract.

Hobbes's starting-point was a state of nature which was completely anarchic, and he supposes the sole object of the contract to be the maintenance of order and peace at any price; the purpose of the contract would otherwise not be attained. Hence the setting up of an absolute supreme power. As soon as a limit is set to the competence of the supreme authority there is a possibility of difference of

opinion as to the position of that limit, and consequently a possibility of conflict and of a revival of the very fear the desire to escape which was the motive for entering into the agreement. Thus no freedom of conscience or religious practice can be recognized in principle, for such recognition involves the possibility of the assumption of a right of command other than that of the supreme authority, and thus the possibility of conflict and renewal of fear. If the sovereign's threat of punishment be countered by a threat entailing everlasting punishments, the very object of the contract for the formation of a state is frustrated. Hobbes had known the terrible and devastating effects of the wars of religion.

Locke, on the other hand, did not visualize the natural condition of man as a state of anarchy. On the contrary, man has 'by nature' certain rights, and indeed most important rights: the rights to life, freedom, and property. The safeguarding of this natural sphere of individual rights is the object of the agreement for the formation of the State; and the competence of the sovereign is limited to such safeguarding. If the sovereign power violates individual rights, it finds itself opposing the very object of the social contract, and so a supreme authority with absolute power is a violation of the very nature of the contract for the formation of a state.

Rousseau's postulate differs from the others as regards the essential *contents* of the contract. All the clauses of the social contract can, he proclaims in the sixth chapter cited above, be reduced to one: 'namely, the fact that each associate hands himself over without reserve and with all his rights to the whole community'. From the words 'to the whole community', we see that for Rousseau it is not, as in the case of Hobbes, the government which possesses the

authority, but the community itself. The community acquires sovereignty by the *contrat social*; and the community, the people as organized by the social contract, cannot dispose of that sovereignty; sovereignty is inalienable. 'I say therefore that since sovereignty is only the exercise of the general will it can never be alienated, and that seeing that the sovereign is only a collective being he can only be represented by himself. Power can indeed be transmitted, but not through an act of the general will.' The government is but a committee of the people, the actual sovereign. The governors ('magistrats ou rois, c'est-à-dire, gouverneurs') merely exercise in the people's name, as 'simples officiers du souverain', the power which the sovereign people has given them, and which it may limit, alter, and withdraw whenever it pleases.

The hypothesis of a contract to form a state can therefore lead alike to the institution of an absolute power, to the setting-up of a moderate constitutional government, and to rebellion against existing governments. It is obvious that a theory of the origin and nature of the State which, as soon as a few incidental factors—not impossible or inconceivable in themselves—were taken into consideration, led to such different and even diametrically opposed conclusions, could not meet the requirements of scientific thought on this subject. Moreover, the increase in the amount of reliable information supplied by legal history and comparative jurisprudence made the fundamental idea of a completely orderless natural condition of man, put to an end by a contract made expressly for the purpose, untenable. The numerous facts about primitive forms of organization brought to light by these branches of study were too glaringly at variance with the theory. And the attempt to save the contract theory at least in principle, by making

the agreement a 'fiction', something which had to be inferred from the consent of the citizens of a state to its rule over them, must also fail. This idea of a fiction as a possible solution is at least as old as Rousseau's writings. 'The clauses of this contract are determined to such an extent by the nature of what is being done, that the slightest change in them would make them useless and ineffective, with the result that though *perhaps* they may never have been formally set out, they are nevertheless everywhere the same and everywhere silently accepted and recognized, so much so that if the social pact were to be violated, every one would return to his original rights and regain his natural liberty on losing the conventional liberty for which he gave the former up.'[1] The 'fiction' will not do the trick, for it is part of the hypothesis, as appears from the earlier passages of Rousseau's treatise, cited above (p. 10), that men *consciously* realize the deadly dangers of the natural condition and *consciously* put an end to it by expressly and deliberately entering into an agreement with one another. The whole theory stands or falls by that conscious, deliberately concluded agreement.

C. *Power Theories.*

The second answer, which likewise readily suggests itself and which has also been often repeated in various forms, is that authority is the creation of those who actually possess most power. The idea that in man's natural condition the strongest, hardiest, and strongest-willed imposes his wishes on the weaker elements, *compelling* them by his power to obey him, is a fairly plausible one, and to appeal to it seems the most 'natural' solution of our problem. 'Nature itself', says Callicles the sophist in his brilliant

[1] *Contrat Social*, Book I, ch. vi.

argument in Plato's *Gorgias*, 'shows, I think, that it is right that the better man should have more power than the worse, and the stronger than the weaker. Nature often proves that this is so, both in the case of other beings and in the case of whole cities and tribes of men: the stronger rules over the weaker and gets more than his fair share. By what other right did Xerxes attack Greece, or his father the Scythians, or—but countless examples can be given' (483 c–d). Voltaire's aphorism, 'the first king was a fortunate warrior', is a concise and witty mode of expressing the same thought. The idea is to be found, expressed however with differences of emphasis, right up to modern times.

Orthodox Marxism, for example, considers the State the external form in which the interrelationships of economic power manifest themselves, the means by which the predatory class keeps the exploited class in subjection and compels its obedience, the form in which economic power is exercised; though it regards it as doomed to disappear and 'wither away' along with class distinctions. And among contemporary writers, the most astute exponent of this conception of the State is Laski, whose more recent writings show an increasingly close approach to the Marxist standpoint. Every society, says Laski in his latest work on the subject,[1] needs some coercive instrument 'to secure the continuance of the stable relations of production simply because, otherwise, it will not continue to earn its living'. The instrument in question is the State. But the State can act only through persons. Now any group in a society which exercises sovereign power must needs be guided in the use of that power by its own views as to the best means of satisfying needs. These will 'necessarily be coloured by its special relation to the process of production.

[1] Prof. Harold J. Laski, *The State in Theory and Practice*, London, 1935.

In a slave-owning society, slave-owners will think that slavery is for the good of the whole society and they will use the State to enforce the relations which a slave-state necessitates.'[1]

According to Duguit, who is anxious in principle to give a purely realistic account of political and constitutional theory, there is no inherent title to authority; neither supernatural origin nor the notion of the agreement to form a state is a scientifically tenable hypothesis.[2] But the plain truth is that 'les plus forts' impose their will on the others. They may derive their power from different sources: they may be the 'strongest' by reason of physical, intellectual, or religious causes, but they *govern* because they are the strongest, to whatever category they belong.[3]

And this opinion is perhaps even more widely held among those who are not particularly concerned with the study of the State. In the figure of Thrasymachus Plato gave a lasting picture, drawn in a masterly manner, of the exasperated practical man, to whom all research into and rummaging after the foundations of law and the State is but

[1] Op. cit., p. 110 et seq. Cf. p. 118: 'By its very nature, it (the State) is simple coercive power used to protect the system of rights and duties of one process of economic relationships from invasion by another class which seeks to change them in the interests of another process. For on analysis the state appears as a body of men issuing orders to fulfil purposes they deem good. Their conception of good is the outcome of their place in the process which is challenged.' Laski accepts as essentially sound the view of Society advocated by historical materialism: 'Our styles of architecture, the form of our literature, the character of our science, *the basic framework of all that we call civilisation,* is, at bottom, determined by these productive relationships': ibid., p. 109. Cf. the same author's 'The Crisis in the Theory of the State', in *Law. A Century of Progress, 1835–1935. Contributions in Celebration of the 100th anniversary of the Founding of the School of Law of New York University,* New York and London, 1937, vol. ii, p. 1 et seq.

[2] Duguit, *Traité de Droit Constitutionnel,* Part I, p. 494 et seq. of the 2nd ed., Paris, 1921.

[3] Ibid., p. 499 et seq.

idle talk, because it is as clear as day to any level-headed man in his senses 'that in all communities law and the *interests* of the established power are identical'.[1] The modern doctrine of State sovereignty reproduces the theory of power in a rather more complex form. The theory of State sovereignty advanced by Jhering, Laband, Jellinek, and others is, all things considered, fairly simple. 'The State is the unified association of men of settled domicile, a union endowed with original sovereignty', says Jellinek.[2] So far, this is no more than preconceived opinion. The 'unified association of men of settled domicile' is portrayed as being invested 'by nature' with sovereignty, i.e. the power of 'giving the effect to its will'. But this really obscures the issue. For what we are trying to do is to find out how the 'unified association of men of settled domicile' originated and what it really is. 'The many, the members of a group in the aggregate, are of course always *stronger* than the individual'; this may at first sight appear to be the explanation and therein may lie the sovereignty 'by nature' of the 'unified association'. It is in this way that Callicles clinches the argument in his speech (quoted above) in the *Gorgias*; but he is more of a realist, sees facts more clearly and knows how to discriminate. After having explained, as set out above, that 'by nature' the strongest rules, he contends that we, the human race, have instituted a different order. 'For we discipline the best and strongest amongst us from their youth upwards and subdue them as if they were lions by incantations and gestures, telling them that there must be equality, and that this is fair and just' (483 b). So far 'the power of numbers' is assumed to exceed that of the

[1] *ἐν ἁπάσαις ταῖς πόλεσιν ταὐτὸν εἶναι δίκαιον, τὸ τῆς καθεστηκυίας ἀρχῆς συμφέρον*, *Republic*, 339 a.

[2] *Allgemeine Staatslehre*, p. 180 et seq. of the 3rd ed., Berlin, 1914.

potentially formidable and strong individual. But Callicles at once proceeds: 'But when a man arises, sufficiently strong by nature, then he thrusts all this from him and breaks loose and makes off, spurning our lessons and charms and incantations and all those of our laws which conflict with nature; and our slave stands up and confronts us as our master. It is then that the law of nature shines forth free' (484 a). So the many are not always stronger than the individual, according to this notion. The matter depends on circumstances and actual relationships, as well as on considerations of strategic skill, and in the end, the formula of the original power of the 'unified association' leads nowhere.

Hence Krabbe was completely justified when he wrote, in his criticism of the principle of the theory of State sovereignty: 'What I want is an *explanation* of that fact', the fact in question being that complete power is vested in the State 'by nature'. The attempt to provide an explanation has been made: Jhering, for example, gave a provisional account in his interesting discussion in *Der Zweck im Recht* about the two 'levers' of egoism, the lever of coercion bringing the State into existence. But the attempt got no farther than establishing the facts that the needs for order and for averting anarchy and chaos in human relationships are vital needs of the group.

Furthermore, the 'fact' under consideration turned out to be unreal, i.e. not to square with historical evidence. The submission of the State to rules of law, the recognition of responsibility of the State for offences committed by its institutions, the growth of new legal rules independently of the State, by way of custom and revolutionary legislation, all these undeniable happenings, so convincingly appealed to by Krabbe in his criticism of the theory of State sove-

reignty, demonstrated the indefensibility of the proposition that the State naturally has complete power.

3. SCEPTICISM AND RELATIVISM

One result of the failure of efforts to explain the nature and origin of the State was that many jurists began to discredit the search for first principles. A tendency arose to confine oneself to the study of positive law, which was, moreover, growing in volume and becoming more easily accessible. Here, according to many thinkers, was something tangible; a man could take constitutions and laws in his hand and read them, could read too about what happened when they were enacted. And this was a reasonable point of view: reflection on and discussion about general theory were too abstruse and too uncertain, and gave rise to more confusion than enlightenment. The result was that political theory relapsed further and further into historical and empirical contemplation. It became purely relativist, negative, and sceptical.

As examples of this extreme point of view we may take the German theorist Kelsen and his Vienna school. According to Kelsen, political theory as such must renounce, as a matter of principle, all attempts to provide a causal explanation of the State and its forms. Each organized state can be examined on purely juridical lines only within the limits of its own system; the *Ursprungsnorm* of each individual organized state determines and defines the nature of the structure. The problem of the origin of the *Ursprungsnorm* is a 'meta-juridical' one and lies outside the scope of our science.[1]

The reasoning which leads to this sceptical and negative conclusion is interesting and often very subtle. But the

[1] Kelsen: *Der soziologische und juristische Staatsbegriff*, Tübingen, 1922; *Allgemeine Staatslehre*, Berlin, 1925, p. 104 et seq. The relativist conception

conclusion *is* a negative one, for the simple reason that, when it comes to the point, it means the abdication of political science as a true science. The fundamental task of every science, the attempt to explain, is abandoned. The problem is handed over to another science, which can be sharply distinguished from political theory and the science of constitutional law, namely sociology, but is at the same time described as being incapable of solution by the latter because sociology will never be able to appreciate *values* or even to ask questions about them, being equipped only for the purpose of investigating facts and phenomena.

At this point one may ask: is this conception of the relationship between sociology and political theory scientifically sound? Why take the view that there is a sharp distinction, an unbridgeable gulf, between these two branches of inquiry? The object of sociology is to examine the phenomena of the formation and operation of groups as such. It is clear that the State is an aggregate; and in that sense the State naturally belongs to the field of sociology. We are thus faced with the phenomenon, remarkable enough but not unique in the history of thought, of a new science and a new group of studies being grafted on to and establishing relations with an existing science. Now to offer obstinate opposition to such a relationship as a matter of principle will not do. Science, after all, is not a system of watertight compartments. Both the demands of theoretical inquiry and those of its practical application constantly require new combinations of research work. Any one who

has not been confined to the Vienna school. Cf. Carré de Malberg, Professor in the University of Strasbourg, in his *Contribution à la théorie générale de l'État*, Paris, 1920, p. 62 et seq: 'The science of law has no concern with the investigation of the origin of the state. The coming into being of any state is for it simply a fact, a fact which is not open to examination by jurists.'

seeks to lock up the particular branch of study to which he devotes himself in a hermetically sealed compartment will only devitalize it and hasten its decay.

Sociology, it is true, looks for causal explanations and uniformities in phenomena, but this does not essentially exclude *values* as an object of its inquiry. In dealing with this point one is faced with a recrudescence of the well-known conflict which arises about all normative sciences. It is a conflict particularly illustrated in the case of ethics: the question is as to its demarcation from empirical psychology. Psychology, it has been argued, can supply only facts and uniformities which actually occur, but normative sciences are essentially concerned with a different object, namely ideals and values. Thus sciences which are concerned with the one are essentially different from sciences which are concerned with the other, and there can be no connexion between them.

The fallacy underlying this argument has been exposed in a clear-sighted and convincing manner by the philosopher Heymans. The relationship, he contends, is expressed the wrong way round, and the antithesis is unsound. For the opposite of the uniform is not the ideal or the valuable, but the anomalous and the accidental whose occurrence cannot be predicted; and the opposite of *fact* in the scientific sense is unreal appearance. Now no one would suggest that our ideals shift about capriciously and arbitrarily; no one could deny that human thought credits values both with actuality and effectiveness. So the objection that sociology can offer us nothing but bare facts instead of ideals, and uniformities instead of values, can be answered in a single sentence: 'Not so: the ideals in fact live and act uniformly within us.'[1]

[1] Heymans, *Einführung in die Ethik auf Grundlage der Erfahrung*, Leipzig, 1914, p. 28 et seq.

Hence part of the object of sociology is ideals which actually live and values which uniformly work in human beings; its task is to assist in the search for such uniformly working ideals. And the same applies to political theory. The difference between the two lies in the fact that sociology examines the formation and operation of groups as such, so that in principle groups of different kinds are of equal importance to it, while political theory focuses its interest on a special group, namely the State. Another difference, a real one, is this: sociology as a separate science is younger and displays some of the advantages and disadvantages of youthful years: keen interest on the one hand, and deficiency in the critical faculty, too hasty generalization, and too much talk about its intentions on the other. For this reason a certain amount of cautiousness and reserve on the part of political science in its attitude to sociology is defensible. There comes a point, however, at which the objective requirements of the investigation must be formulated and observed. We must never abandon our critical faculty, but neither must we wilfully close our eyes to the results of new developments, even though these are achieved in a somewhat more speculative fashion than we have been accustomed to follow in the territory entrusted to us. Finally, let us bear in mind the fact that our great forerunners, Aristotle, Macchiavelli, and Montesquieu introduced into their arguments a large number of considerations drawn from sociology and group psychology, and that these still form part and parcel of the teachings of constitutional law, though they do not appear on the surface. Our task is to try to pass from a chaotic and crude empiricism to a knowledge assimilated with consciousness both of the object of our study and the means of attaining it; that is to say, to a knowledge *methodically* come by.

CHAPTER II

THEORY OF THE FORMATION OF THE STATE

I. DIFFERENT KINDS OF HUMAN GROUPS

ANY attempt to solve the problem of the State by approaching it from the point of view of the individual is foredoomed to failure. To take as our starting-point individual man in the abstract, man considered apart from his fellow men, is futile. It is futile because the whole idea is completely unreal. Man does not exist, has never existed, and cannot exist, as a separate being. He lives and has always lived in communities and groups. Robinson Crusoe is an interesting character as portrayed in the novel; but it is erroneous to think of humanity as so many Robinson Crusoes. Man is a social animal, gregarious by nature, and political science must regard him as gregarious. Political science deals with men living in communities, not with the 'stateless' man.

This 'sociological' conception, as it will be called, is not new; far from it. Aristotle's famous dictum: 'Man is a political animal' (*ζῷον πολιτικόν*), is based on the same idea. Aristotle maintains—and does so in express terms—that the State is relatively of greater importance than the individual, 'for the whole is prior to the part'. Nor can his *πρότερον εἶναι* be taken simply to imply priority in point of time; it must mean that the State enjoys logical priority and takes precedence of the individual. And this precedence determines the nature of the State. We may put it like this: there are two ways of regarding and examining any complex phenomenon. We may concentrate on the composite whole as a unit, or we may focus our attention on

the parts. But when examining the constituent parts we must never lose sight of the fact that they are parts of a greater whole. The observer can study either the combined whole or a part. But what he cannot do, without disregarding the actual facts, is to treat the part as something independent of the whole. He cannot, therefore, study man as an independent individual.

Now modern political science finds itself confronted by a problem which was outside the purview of the older authorities. These all assumed the existence of a certain fixed psychical make-up in human beings with a specific set of reactions to given stimuli. Such writers as Plato, Aristotle, Macchiavelli, Hobbes, Locke, and Montesquieu continually discuss human psychology, and base arguments upon their findings. They often over-generalize, it is true, and draw hasty and unverified conclusions; but the fact remains that they make the assumption referred to.

Can we safely make this assumption to-day? Modern science, in particular modern empirical psychology and social psychology, has questioned whether what we know of the psychology of the individual applies to that of the group. 'The most striking peculiarity presented by a psychological crowd is the following', says Gustave Le Bon, a doctor and psychologist:

'whoever be the individuals that compose it, however like or unlike be their mode of life, their occupations, their character, their intelligence, the fact that they have been transformed into a crowd puts them in possession of a sort of collective mind which makes them feel, think and act in a manner quite different from that in which each individual of them would feel, think, and act were he in a state of isolation. There are certain ideas and feelings which do not come into being, or do not transform themselves into acts except in the case of individuals forming a crowd. The psychological crowd is a provisional being formed of hetero-

geneous elements, which for a moment are combined, exactly as the cells which constitute a living body form by their reunion a new being which displays characteristics very different from those possessed by each of the cells singly'.[1]

Sighele, a lawyer and sociologist, says much the same thing in his well-known work *La Foule Criminelle*.

The point is a very important one, and one the significance of which is often not fully appreciated even by those familiar with it. For, *if* the contention be sound, it would follow that no useful analogy can be drawn between the phenomena of individual consciousness and the phenomena of group consciousness. We should, when studying the group, be dealing with phenomena and combinations of phenomena which were *sui generis*, being governed by laws other than those of the empirical psychology we know. Our science would, as far as we can see, break down completely.

A number of facts do exist which tend to make this proposition plausible; facts which, for that matter, have been observed before. 'Senatores boni viri; senatus autem mala bestia.' The implications may be expressed as follows: 'The *individuals* who compose this group are good, trustworthy people of normal psychology. But the *group* which they form is as untrustworthy and incalculable as a wild animal; its capriciousness and fickleness are such that its reactions can never be foreseen.' This makes the outlook for our science somewhat dark. It would have to divide its activities completely; what is more, it would have to despair of obtaining any reliable results. In our approach to the group, we should have to allow for the fact that we were

[1] Le Bon, *The Crowd*, London, T. Fisher Unwin, 1903, Book I, ch. i., p. 29. Cf. Freud's *Massenpsychologie und Ich-Analyse*, Vienna and Zürich, 1921, p. 6 et seq.

dealing with phenomena of a fundamentally different kind from those connected with single individuals and that these were such that we could not appreciate them; in fact, with a new kind of reality.

So we have every reason to reflect before taking this step. In science it behoves us to be careful not to accept new principles too readily. Economic considerations alone demand that science shall not be too lavish in turning out working hypotheses. Those who apply sound scientific methods do not, as soon as they find themselves confronted by apparent contradictions, immediately set up new hypotheses suggesting different principles. Before supposing the existence of a new kind of reality we should carefully investigate, with open minds, the question whether the phenomena, when properly set out, compared, and analysed do not fall within known categories after all. And the demand is the stronger because these special reactions of the group, these expressions of the so-called 'collective mind', 'group mind', 'popular mind', 'crowd mentality', &c., are in fact made manifest by the acts of individuals. This gives us another reason for questioning the hypothesis of an essentially different 'collective mind'.

In fact, further investigation, reflection, and consideration show that the hypothesis is an unnecessary one.

When we proceed to investigate the phenomena in question, we find that there are aggregations or groups of different kinds. But how are we to arrange them for the purpose of our inquiry? What is to be the *principium divisionis*? Two potential methods of classification at once suggest themselves as the possible bases of methodical investigation. Human groups may be classified in two ways: (1) According to whether the individuals composing them are or are not *assembled together*; and (2) according to

whether they are or are not *organized*. This gives us four classes in all:

1. People assembled together, but unorganized; e.g. any collection of people, a real 'crowd'.
2. People assembled together and organized; e.g. a meeting, a church congregation, a theatre or concert audience, a procession, an army on parade, a ship's crew.
3. People not assembled together, and not organized; e.g. those who exercise a particular profession or trade which has no professional or trade organization; a caste; undergraduates taking the same Honours course; the readers of a particular periodical; ex-pupils of a particular school.
4. People not assembled together, but organized; e.g. a family, a society, a trade union, an organized political party, a church, the State, a conference of States, the League of Nations.

There are other modes of classification. McDougall, for instance, first divides groups into two main classes:

(*a*) Natural groups, and
(*b*) Artificial groups; while

(*a*) Natural groups are then subdivided into
  (i) Groups based on relationship (e.g. the family), and
  (ii) Groups based on geographical considerations (e.g. the inhabitants of a small island).

(*b*) Artificial groups are subdivided into
  (i) Those formed deliberately (e.g. a club, a trade organization);
  (ii) Those whose association is due to custom or tradition (e.g. Hindu castes); and

(iii) A mixed variety, consisting of groups formed partly as the result of tradition and partly deliberately (e.g. the Roman Catholic Church, or British universities and their colleges).[1]

Classification on these lines is quite feasible, but I doubt whether the method is likely to prove satisfactory. The *principia divisionis* employed are not general, and no exhaustive division is obtained. Take such groups as 'the State', or 'a nation': do they belong to the 'natural group' class or to that of the 'artificial group'? The method used prejudges a question which should remain an open one. I therefore think that better results will be obtained by adopting the more general method first suggested.

So let us now consider the four classes one by one.

The first class, the unorganized assembly, was very much the subject of collective psychology in the early days of that science. 'Crowd Psychology' deals mainly with this class. 'The crowd' is capricious, fickle, predisposed to excesses far beyond anything which the ordinary actions and behaviour of its constituent members would warrant. 'Excesses' is indeed the right word. A number of people, an unorganized group, is capable of atrocities which none of its individual members could ever commit on his own. Take the horrors which revolutions entail, and which were at one time a regular feature of strikes (Sighele's book contains some remarkable examples). The atrocities of the French Revolution, the behaviour of the 'Porteous Mob' at Edinburgh, and the destruction caused by the Gordon Riots in London, may be cited as historical examples. It is usual to refer, in this connexion, to two closely associated ideas: Suggestion and Imitation. The crowd is susceptible to suggestion in a very

[1] McDougall, *The Group Mind*, Cambridge, 1921, p. 89 et seq.

high degree, and is ever ready to imitate. True, but does this lead, by necessary implication, to the hypothesis of a collective psychology governed by laws other than those of ordinary psychology? What we call 'suggestion' is the forceful imposing of an idea or combination of ideas upon some one else without any appeal to reason, so as to influence that person's consciousness while his reasoning faculty remains inactive. Passivity on the part of the person influenced is an essential feature of 'suggestion'. Suggestion differs from *conviction* i.e. the process of making some one accept an idea by reasoning. He who is convinced by an argument is conscious of the line it takes and of the points made. The listener's or reader's own consciousness is active; he assumes an independent attitude towards the line of argument, and he considers, compares, criticizes, judges, and finally arrives at a conclusion for or against. There is no such independent action when suggestion is employed; the subject is a mere tool or instrument in the hands of the suggestor.

Suggestibility is a prominent feature of the psychological type whose main characteristic is a narrowing of consciousness. Pathologists will associate it with hysteria. It is therefore a remarkable fact that a crowd, composed as it is of people of all kinds, should manifest in its behaviour the psychical characteristics of the type of person with a low degree of self-consciousness. But the facts of the situation will explain this, especially the circumstances in which those composing the crowd find themselves. It is obvious that these are circumstances which tend very much to diminish self-consciousness. The mere fact that a large number of people are gathered together means that a great deal of psychological energy is used up, owing to the number and intensity of sensations, visual and auditory. What is

perhaps more important is that the consciousnesses of those present will be charged with emotion to an unusual degree. First of all, they have not met by chance; events have occurred which stir the mind, e.g. some grave danger, or a foreign invasion, or the assassination of the head of the State or of a popular leader. Excitement ensues; there is a 'tense atmosphere', due to indignation or anger at some real or imaginary injustice. The consciousness of each individual is filled with emotional ideas, and in times of danger and unrest that is just what makes people leave their homes and assemble together. Then, being together in great numbers itself affects the emotions, conjuring up a vision of irresistible power. This again diminishes self-consciousness and creates a feeling of constraint which reduces receptiveness, so that normal, well-balanced mental activity becomes impossible. The diminished self-consciousness does not allow of critical consideration of arguments or weighing of consequences. The individual loses his sense of responsibility, and the terrible outcome of it all is an uncontrollable, unrestrained mob which proceeds to acts of violence and cruelty committed usually by the insane and the abnormal only.

So it appears that the ordinary laws of psychology suffice to explain these unusual and remarkable phenomena, and that collective psychology is not essentially a separate science but is merely a special branch of empirical psychology. What psychologists aim at is to investigate, impartially and carefully, the question of how individual reactions combine and what modifications ensue in the special circumstances of the case, i.e. when groups are formed.

Examination and study of the second class of group, that of an organized collection of people, such as an audience,

an army on parade, a procession, or a meeting, yields similar results. How, we may ask, does this class of group differ from the first? The new element—organization—is due to the fact that the individuals composing the group have a common object, one which they have consciously adopted, and one which necessitates some particular *arrangement* of the group. This arrangement is determined by the special nature of the object, and varies accordingly.

People assemble together as an 'audience' in a theatre or concert-hall with the avowed object of experiencing aesthetic pleasure. All that is necessary is that the members of the audience should be so placed that the sights and sounds presented and produced may be perceived by each of them. It is of course the case, as was known by the ancients, that certain subsidiary objects may be pursued on these occasions: *Spectatum veniunt, veniunt spectentur ut ipsae.* Theatre managers who are alive to this fact often make the seating arrangements more complicated than the main purpose requires.

Arrangements made for a meeting which is to deliberate demand a somewhat higher degree of organization. They must be such as to enable not only what is expressed to reach the consciousness of every one present, but also to make *exchange* of thoughts possible. As it is necessary to regulate this exchange of thoughts, some provision must be made for the *conduct* of the meeting. This task has to be performed by some functionary, a committee if not a chairman.

A still higher degree of organization is called for when the assembled group has to carry out definite physical movements with the object of proceeding, as a group, from one place to another. In order to move a large collection of people from one place to another subdivision is necessary,

or utter confusion will result. In the case of a long procession, it is not sufficient to appoint a single leader or a small committee; a number of officials must be named as stewards and be distributed over the length of the procession, each conducting a section and being responsible for maintaining its relative position as long as the movement of the whole continues.

Further subdivision is necessary when the group wishes to carry out more than a simple movement from one place to another and has to perform complicated operations. Examples are afforded by a ship's crew; the staff of a factory; an army in battle formation about to engage other groups similarly disposed. In the case of fighting, it may be observed that in primitive times warfare was conducted on simple lines, with little in the way of organization or leadership. 'Their leaders depend less on authority than example; they command admiration in accordance with their readiness to engage, the conspicuous part they take in the fighting and their daring', runs Tacitus' description of the Teutonic tribes.[1] Organization and subdivision based on the nature and variety of arms and equipment at the disposal of an army makes for a great increase in the effectiveness of combined operations. The increased effectiveness due to apt organization and the proper use of the various resources may be proportionately high. Hence the advantage possessed by a resolute group under skilled leadership, and efficiently equipped, when it engages larger groups which are comparatively worse off as regards efficiency, mobility, and generalship. Whenever we read in history of crushing victories won by relatively small forces against vastly superior numbers, we at first feel inclined to doubt the accuracy of the records or to

[1] Tacitus, *Germania*, cap. 7: 'Et duces exemplo potius quam imperio, si prompti, si conspicui, si ante acies agant, admiratione praesunt.'

consider the accounts grossly exaggerated. This may, of course, sometimes be the case. But, nevertheless, at certain stages in the development of the science of strategy, what are *prima facie* 'miraculous' victories, attributable to divine intervention, are found to be capable of explanation. The greatest generals have been men with a talent for organization and with original ideas about strategy, equipment, and training, by which they brought their troops to a high state of efficiency, and with a capacity for rapid decision and 'surprise' moves; in other words, men of constructive imagination.

That which unites the members of the organized group and enables it to act in this way is its common purpose. Take away that common purpose, or reduce the extent to which it is impressed upon the consciousnesses of members of the group, and the difference in behaviour between the organized collection and the unorganized group disappears likewise.

Consider the position. In the case of an organized group in action, such as an army engaged in battle, a number of the conditions determining certain of the phenomena of consciousness are, it is true, the same as those which obtain in the case of groups of the first type. That is to say, the individual consciousness of each member is taken up by a great number of impressive sights and sounds and by highly emotional ideas such as the threat of danger and the prospect of victory and glory or defeat and disgrace.

Self-consciousness is narrowed in this case too, and suggestibility is thereby increased and the ground prepared for imitation. But there is a single common purpose at work in the minds of the participants, and this tends to occupy what self-consciousness remains. Hence while here again reactions are abnormal and actions spasmodic, this time they

serve the common purpose and become deeds of 'superhuman' bravery. 'Superhuman' is indeed the right word, because the ordinary man in ordinary circumstances, when all the facts and possibilities are present to his consciousness and he can judge them independently and calculate their consequences, would be incapable of such deeds. That is why the conduct of the leaders, of the commander and his staff, are of the utmost importance: the increased suggestibility due to diminished self-consciousness makes the tendency to imitate the stronger.

Now should that common purpose suddenly cease to exist or lose its driving force; if for some reason the object appears to be incapable of achievement, the cause a lost one, then the group will resume the character of a mere unorganized crowd. It becomes capable of unaccountable and irrational actions and flees in utter confusion, the stupidest and most ill advised thing for it to do. Hence the terrible slaughter sometimes inflicted on an army in full flight.

Marshal Foch's dictum 'a battle is never lost as long as it is not *believed* lost' is probably an exaggeration and too dogmatic an assertion; but the idea is sound. As long as a group remains dominated by its common purpose it will not disintegrate and its essential power will remain unbroken.

The common purpose in the case of an army is that of breaking the enemy's power and securing a victory. In adopting that purpose the members of the group may be actuated by very different motives. Men may join the army out of a sense of duty, when the human group to which they belong is threatened; for purely selfish motives such as thirst for glory, desire for booty, or craving for power; because of their love of adventure; through fear of punishment or ridicule; or they may be actuated by a combina-

tion of motives. Other things being equal, a patriot army is, as Macchiavelli so well appreciated, worth more than any other; in a defensive war, 'for hearth and altar', the realization on the part of the defenders of a common purpose is specially powerful. It is this which makes for increased power of resistance on the part of the more hardy and resolute nations in defensive wars. I make the qualification, 'other things being equal', for, on the other hand, a good deal of importance is to be attached to the factor of *becoming accustomed to* emotional representations. Generally speaking, an emotional representation affects human consciousness less every time it is repeated, and stirs the emotions less; people become hardened. Consequently, troops who have been through several battles—'seasoned' troops—become less susceptible to panic; they more easily retain their 'presence of mind', which means that they retain the capacity to take in at a glance what is happening around them and for that reason to preserve their formation. As against this, they usually lack the enthusiasm displayed by younger units.

Ties are usually stronger among more seasoned troops, and they develop a feeling of pride in the enhanced prestige of their own units, a 'corporate spirit' or *esprit de corps* as it is called. This provides a natural and powerful check to any tendency to break formation or withdraw from the joint venture. Another important factor is the suggestion made to the group that it is invincible. In primitive times this was brought about by saying that the gods were on its side, divine aid having been secured by sacrifices, and being manifested in omens; at a later stage, Roman generals who appreciated the value of the psychological effect used to have the omens 'assisted'. Troops who have been led to victory again and again by the same great general acquire

the feeling that they cannot be beaten, which in itself adds to their strength.

The best troops combine all the best qualities of their nation: physical courage and tenacity, enterprise and discipline, together with a conviction of the righteousness of their cause, training, hardening, and *esprit de corps*. Such were the characteristics of the soldiery of Sparta, Rome, and Switzerland when those nations were at the height of their power and their governments at the summit of their efficiency and when they were fighting for the very existence of the communities to which they belonged. The same applies to Cromwell's Ironsides; and, as regards naval warfare, to the seamen who manned the fleets of the Dutch Republic in the sixteenth and seventeenth centuries.

We draw the following conclusion. What is called the 'spirit' or morale of an army, navy, regiment, or a human group generally is a matter of the ratio, in the consciousness of the members of the group, between the strength of the realization of a common purpose and the psychological factors threatening to undermine the operation of that realization. That 'spirit' is called 'good' or 'bad' according to whether the ratio in question is favourable or unfavourable to the achievement of the common purpose. Ordinary psychological principles meet the case, and, so far, we are able to dispense with the hypothesis of a new entity, the 'collective mind'.

The phenomena which manifest themselves at a *meeting* point to the same conclusion. They are less striking because, generally speaking, emotions do not attain the same pitch; the lives and existences of members composing the group are not at stake. But here again a common purpose is the dominant factor in the consciousness of the persons composing the group; it determines their actions and restrains them

from measures which contravene it. It is for this reason again that, when the purpose weakens and the realization of it grows fainter and fainter, phenomena may be observed similar to those manifested by the unorganized crowd. A meeting which 'flags' becomes restless, undecided, and susceptible to rapidly changing impressions; will laugh, boo, or cheer without adequate objective cause, and forgets one of the necessary conditions of its achieving the common object, namely silence. The brake which the common purpose ought to provide ceases to function or to function adequately.

A meeting approximates still more closely to the appearance of an unorganized group when some of those attending it consciously adopt a different purpose, that of interfering with the expression and exchange of thoughts. If steps are not immediately taken to put those who threaten the main purpose out of action, the meeting will soon present the same appearance as an unorganized crowd, fickle, irrational, and equally prone to violence. The morale or 'spirit' of a meeting is again 'good' or 'bad' according as the ratio between the strength of the common purpose and that of opposing factors is favourable or unfavourable.

The third class of group, that of an unorganized body of people not gathered together in one place, is characterized by the similarity of certain factors which are, to a greater or lesser degree, essential to its existence. The qualification is important, since the degree varies considerably. All readers of a particular newspaper; all ex-pupils of a particular school; all undergraduates taking a particular Honours course; all members of a particular profession or trade are examples of this kind of group. What they have in common conduces, according to its importance, to a certain group feeling, making them more susceptible of and better disposed towards certain ideas and aspirations than people who do

not belong to the group. The germ, as it were, of collective aspirations and collective action is present. It is the latent possibility of united action which gives this kind of group its significance. This means that there is a readiness to co-operate in taking action for which organization is essential; in other words, the group is ripe for conversion into a group of the fourth class, which will be dealt with presently. The group now under discussion may find its particular combination of ideas presented in an intensified manner at some particular stage; but, should this happen, it will also be found that reasoned criticism has contributed more to the process than it does in the case of an unorganized assembly. The difference is due to the fact that the self-consciousness of the individual is not diminished by the simultaneous operation of a great number of highly emotional ideas. There is, consequently, more room for corrective ideas; consciousness works more freely, remains open to new impressions; there is room for comparison, or in other words for the critical faculty to operate. So when events invest a particular idea with special importance, when members of a group of this class become especially conscious of a particular interest, there is less likelihood of loss of sense of proportion than in the case of an assembled group. The facts of the situation of course make violence of expression or action less possible. As things are, thoughts and feelings may be expressed and relieved by seizing one's pen and writing to the newspapers or drafting a pamphlet. Normal people who are not highly strung or unbalanced will find that their ideas automatically undergo some modification when this is done. Hence there is less likelihood of utterly uncontrolled and, for that matter, fallacious arguments and ill-considered appeals than there is in the case when a vehement, stirring address is delivered to an

excited crowd. It does not take much to make highly emotional and comparatively unintelligent people commit their thoughts to paper when they see some threat to a common interest; while others will not take such steps without due reflection and careful verification of their facts. But in the case of groups of the first class, circumstances favour uncensored expression and thoughtless action; in the case of groups of the third class, the circumstances make for reflection, and all possibility of immediately translating thought into action is excluded.

It appears, then, that these groups naturally tend to convert themselves into groups of the fourth class, i.e. into organized groups of people not gathered together in one place. Anything which occurs to make members specially conscious of their common interests will have the effect of making the more intelligent and more active among them confer with their fellows with a view to joining forces. This is especially the case when some common danger threatens them, or their collective interests are in some way prejudiced, or their prestige jeopardized. The feeling shared by all gives rise to a common purpose, that of safeguarding the threatened interests or improving common conditions in relation to those of other groups. When physical contact is impossible—as is almost always the case in the more cultured walks of life—means must be found to effect the exchange of thought and joining of forces as best possible. This means that there must be some *organization* to decide upon ways and means.

The form this organization takes depends again on the nature of the common purpose. It will be simple or elaborate, according to the importance of that purpose. If the object can be achieved by a few simple steps, organization will be comparatively simple: for example, if the ex-pupils

of an educational establishment desiring to commemorate the anniversary of its foundation and express their common sentiments; or again, when the friends and admirers of some one about to celebrate his jubilee or to attain a particular age wish to give some token of the appreciation they share. In such circumstances a very slight degree of organization will meet the case. The object can usually be achieved by circularizing those concerned. Some leadership is essential; the circulars must be sent out by some one person or body. The appointment of the official body is, normally, an equally simple matter. Those members who happen to be keenest or most active or least busy form themselves into a 'committee' and the rest usually fall in with the idea.

Rather more organization is necessary when the object is one which cannot be achieved by a single act but requires several *decisions*. Further *deliberation* will usually be necessary; only in exceptional circumstances can the matter be disposed of by the committee's sending out a number of written communications. Changes of standpoint, further deliberation, and reconsideration in the light of altered circumstances are virtually unavoidable. New decisions can seldom be reached—and when they are, it is only with great difficulty—by correspondence. The method in question takes up a great deal of time, and to get a resolution passed in this way is often impossible. So verbal discussion, deliberation, and decision by resolution are indispensable. Hence adjournments—in other words, a number of meetings—have to be resorted to. When membership is not too large, these may be meetings attended by all members of the group, general meetings in the proper sense of the word. But when the members are too numerous, it may be difficult or even impracticable to arrange for discussion open to all. To meet these difficulties, the system

of representation of members by some of their number, elected by sub-groups, was instituted. Discussion and decision can then be the work of the assembled delegates.

The system of representation as we know it to-day, adopted as a matter of course by groups organized for all kinds of objects, is in fact the result of long experience. There is, when one comes to think about it, nothing obvious about decision by assembled representatives. It represents the solution of a problem. The more obvious course is for the delegates not to pass a final resolution unless authorized by the individual members to pass *that particular* resolution. The 'mandate' and 'referendum' appear at first sight to be the most 'natural' systems. But there are serious practical objections to this kind of procedure. Much time and labour are expended in arriving at a decision.[1]

A meeting of delegates is itself a group of the second of the four classes, and has all the characteristics of such. But it is a special species of the genus and has its own special features. There is a new factor: members attending meetings do not discuss and decide on their own behalf, but on behalf of other people. This means that they have to account to others for what they say and decide, and may be called to account accordingly. The knowledge that they are there on behalf of other people and will presently have to answer for the opinions they express, that what they say will be subjected to criticism, exercises a restraining influence; and the delegates' mental outlook is likely to reflect this knowledge. There is consequently less chance of ill-considered, sudden, and rash decision in the case of a representative assembly, especially if its term of office is fixed, than in the case of an ordinary meeting. Hence there is no justification for

[1] See Strachey, *The Referendum*, London, 1924; and Foreign Office Handbook No. 159, *Plebiscite or Referendum*.

comparing (as is often done) modern democracy, organized on the representative system, with ancient Greek democracies, particularly that of Athens. As against this, the representative character of a meeting of this kind does tend to make its debates less interesting. It is often possible to forecast the result of discussions; frequent meetings do not make for good listeners; and when a report of the proceedings is bound to be published members grudge the trouble of following a debate in which they themselves do not intend to take part. As a result, attention is paid only to unusually bright and intelligible speeches, or to such as make an appeal through the speaker's wisdom or eloquence. Attendance at a Parliamentary debate or at the meeting of the council of a large town often spells disappointment. But the facts are capable of psychological explanation. It is difficult, if not impossible, for any group—as it is for an individual—to maintain the same high level day in, day out; to be always as impressive and sublime as in the great moments of life. 'Democracy means mob government' we often hear or read. The above shows how unfair is this criticism of modern democracy. The process by which a decision is reached by representative gatherings differs fundamentally from that which characterizes groups of the first of our classes. Representative meetings reach their decisions after opportunity has been afforded for urging the cause of every interest affected and placing every relevant fact before the meeting, in other words after every point of view has been presented. These views have, of course, been advanced in the press for some time before and articles have been written about them during the preliminary stages. It is not hasty, impulsive, and rash decision that is the evil of representative institutions, but rather slowness and delay in arriving at a decision.

2. THE STATE AS A GROUP

Coming to the theory of the State, we can now, in the light of the results of our inquiry, reasonably expect to find an intelligible combination of correlated phenomena, conforming to known principles.

We have seen (i) that organized groups are formed when a number of people find themselves in similar circumstances, and (ii) that the mode of organization depends on the specific nature of those common circumstances and on the common object aimed at. Now when a tribe ceases to be nomadic, or, in other words, when a group of human beings settles in some particular territory, a number of circumstances and defined interests become common to all members of the group. The first of these interests is that of defence against dangers which threaten the lives and property of each and all; especially such dangers as emanate from other, hostile groups. These common dangers give rise to a common purpose, that of seeking means by which to combat them. Experience—bitter experience—and necessity teach that the organization of such forces as are available is of paramount importance. The process reveals, incidentally, the existence of differences in ability, character, and intellectual and moral capacity among members of the group.

When danger threatens, the common will (*Gesamtwille*) comes into being. The explanation of the 'common will' phenomenon vouchsafed by Wundt, who makes it a 'product of history',[1] is vague and incomplete rather than inaccurate. He regards the phenomenon as something arising from common tradition: 'Posterity regards the tradition handed down to it as positive will. The will of

[1] Wundt, *Völkerpsychologie. Eine Untersuchung der Entwicklungsgesetze von Sprache, Mythus und Sitte.* 9. Band, *Das Recht*, Leipzig, 1918, p. 323 et seq.

past generations is strengthened by the myth which invests them with demonic power and thus lays the foundations for a religious sanction for it.'[1]

But tradition does not in itself amount to Common Will. Common memories, traditions, and myths constitute a complex of ideas which tend to make the tribe a group of the third of our four classes (see p. 37, *ante*). But a 'common will' is due to the organization of members of a group consequent upon the formation of a common purpose, which in turn results from consciousness of some danger threatening all, or from the prospect of some common advantage which all desire. Among primitive people the common purpose would be a united front against a common enemy, or the acquisition of new resources by conquest, so that its needs may be satisfied when wasteful primitive methods of cultivation have exhausted the tribe's own lands.

The armed forces of a primitive tribe fight with little in the way of formation. We have already cited Tacitus' *duces exemplo potius quam imperio . . . praesunt*; leadership means nothing but 'leadership', and its effectiveness depends on the force of example in point of courage and strength rather than on any recognized authority, any right of command. The important transition from merely actual to obligatory obedience is explicable by reference to the specific nature of the common effort. Any man who suddenly leaves the ranks and goes off and fights on his own exposes the group of warriors to a danger which is out of all proportion to anything the success of his individual effort may achieve. Dutch naval history records an instance in which disciplinary measures were taken by Admiral De Ruyter against Tromp, who had followed up a victory without instruc-

[1] Op. cit., p. 328.

tions and had thereby exposed the main body of the fleet to danger.

When a penal sanction is imposed on refusal to follow instructions obedience becomes a legal duty and authority a recognized institution. Groups whose imagination or memory is too weak to enable them to appreciate the nature of the danger we have just indicated are at a disadvantage. Enthusiasm, instinctive obedience, and constructive imagination will increase the chances of efficient organization. And efficient organization improves the prospects of survival.

It follows that a tribe which is threatened by hostile groups, not merely from time to time but continuously, will reflect that state of affairs in its organization. A brilliant, courageous, and resolute leader will be found to enjoy a greater degree of effective authority; and the individual members of the group will appreciate so much the more the danger of withdrawing from the ranks and disobeying orders. The legal and political history of the Great Migration and its influence on the political organization of the Teutonic tribes affords a striking illustration of this process. Schröder in his *Lehrbuch der Deutschen Rechtsgeschichte* describes how political organization was found to be inadequate to the requirements of the period, and how this brought about transition first from a free state to monarchy, and then from Teutonic electoral monarchy to effective royal authority.[1] We do not as yet know with any certainty what was the cause of the Great Migration; it was probably due to over-population and primitive methods of cultivation combined. But it is clear that it was accompanied by a tremendous, protracted struggle for existence, which gives

[1] Schröder, *Lehrbuch der Deutschen Rechtsgeschichte*, 6th ed. by Prof. Von Kunszberg, Leipzig, 1919, p. 97.

it its significance from the point of view of the study of the origin of authority. The mere transporting of a group from one place to another would necessitate a higher degree of organization than would obtain before the migration took place.

I will leave for the moment the question of further developments of the powers so instituted. Suffice it to say that group organization tends to strengthen itself, and to become more elaborate as it develops. These two factors together produce the continuance of authority as an established institution, and the increase of experience. 'Experience' in this connexion means knowledge, technical, economic, and intellectual, with the result that the increase of experience is the advance of civilization. As regards technical knowledge, the need for defensive measures against foreign perils necessitates more and more the appointment of qualified leaders of smaller military units. The period being one of 'natural economy', these leaders are paid in kind, and are awarded land and booty. There thus arises a class of leaders, of men distinguished from their fellows, a propertied class which displays the tendency—as it is a principle of human nature to promote the interests of one's descendants—to become hereditary and develop into a hereditary nobility. The other side of the picture is the creation, as a result of the subjection of the vanquished, of a class of persons without rights, treated as slaves or serfs.

Further demands are made on governmental institutions when subdivisions in the social order and the annexation of territory, bringing with it the need for improved communications, increase the complexity of group life. The number of matters entrusted to the institutions in question is then vastly augmented. Roads have to be made and maintained, for both military and commercial reasons,

trade and trade routes require protection—in other words, police and magistrates have to be provided—and more protection against external attack is necessary than when the tribe led a primitive life and occupied a small territory. Consequent upon this growing complexity of the social structure and these developments of trade and communications, we find an increasing need for the regulation of rights and the formulating of rules of human conduct, the reason being that the new, more complex relationships constantly occasion disputes between the various interests, and give rise to uncertainty, friction, and conflict. In other words the need for legislation makes itself felt. The more complex social relationships become, the greater the need for predictability of conduct. In a complex organism the action of any one part depends upon the co-operation of other parts, failing which proper functioning of the whole becomes extremely difficult if not impossible. Mere tradition and customary law no longer meet the requirements of a vast number of human relationships, especially the newer relationships referred to.

Rules which are laid down must be complied with, and compliance must be ensured; rules are made to be kept. A set of rules which are not observed is an idle threat and has no real significance. Legislation presupposes that laws will be executed. Provision has to be made to counteract omission to carry out the rules.

This brings us to the main functions of the State. In the history of political science, we find these functions classified and distinguished in different ways. Montesquieu's famous triad is constituted differently from that of Locke, on which, however, as Montesquieu's own exposition shows, it was modelled.

Locke's triad was as follows: legislative power, executive

power, and federative power. He describes the legislative power[1] as 'that which has a right *to direct how the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it'. Now such laws require continuous execution and, once made, they are to continue in force. But it does not take long to make them, so, according to Locke, it is not necessary for the legislature to function all the time. Execution of the laws being, however, always necessary, there must be some power which functions continuously in order to see that the laws made are carried out. This explains why legislative and executive powers are often separate powers.

The third power, which Locke calls the federative power (without caring much about the name: 'So the thing be understood, I am indifferent as to the name') is the power which has the final word in matters which concern the relationship with other similar groups. In relation to the rest of humanity, the group forms a single body which is still in the pre-social state, just as its individual members were formerly in a state of nature in relation to one another.[2] Hence any dispute between a member of the group and some one outside it is dealt with by the community, and on any injustice being inflicted on a member of the group redress is the concern of the whole. So the federative power has the right to declare war and conclude peace, to make treaties and alliances, and to conduct negotiations and transact affairs with any one outside the commonwealth.

Montesquieu's triad was clearly inspired by this division; his preliminary exposition is pretty well on all fours with Locke's description. 'In every government there are three

[1] See Locke, *Of Civil Government*, ch. xii. 'Of the legislative, executive and federative power of the commonwealth.'

[2] For Locke's general theory of the origin of the State, see p. 12, *ante*.

sorts of powers',[1] are his opening words: 'the *legislative*; the *executive*, in respect to things dependent on the law of nations; and the *executive*, in regard to matters that depend on the civil law.' The second of these, 'la puissance exécutrice des choses, qui dépendent du droit des gens', has practically the same scope as Locke's 'federative power'. But when the triple division is elaborated, we find a divergence. Montesquieu's description of the legislative power is irrelevant to this difference; it is, in effect, mere repetition. 'By virtue of the first the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted.' The parting of the ways begins when the second of the powers is enlarged upon: 'by the second he [the prince or magistrate] makes peace or war, sends or receives embassies, establishes the public security and provides against invasions.'

'Establishes the public security': this, then, concerns not only relations with other groups, but also the domestic affairs of the group itself. And when the third power is reached, the two descriptions definitely part company. 'By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other is simply the executive power of the state.'

The true position is as follows: in the course of elaborating his triple division Montesquieu imperceptibly creates a fourth member of it; his 'executive power', unlike Locke's, does *not* comprise the judicial power which he (Montesquieu) makes into a separate one.

The difference can easily be explained. Montesquieu, being a magistrate by profession, was fully conscious of the

[1] Montesquieu, *L'Esprit des lois*, Book xi, ch. vi, 'De La Constitution d'Angleterre'.

essential differences between administrative and judicial functions. The former deal with acts and remedies prescribed by law or essential for the fulfilment of purposes which the law has explicitly or implicitly determined. The task of the latter is to wipe out the consequences of any actions which may conflict with the rules laid down, and the power concerned has consequently first to establish whether some rule has been infringed by some actual misconduct and then to counteract the effect of the infringement and provide for redress. The executive function, then, is the function of seeing that the rules operate; the judicial function is that of restoring the rule of law when violated. These two functions are as important for the domestic affairs of members of the group as they are for its relations with other groups.

We may put it this way: on analysing the activities of the group when it has attained the highest stage of development three functions are found to be distinguishable:

1. That of enacting rules for the group's future activities.
2. That of giving effect to those rules.
3. That of counteracting conduct which conflicts with the enacted rules and tends to prevent the attainment of their objects, immediate or ultimate.

These three functions are divisible, from the point of view of group activities as a whole, into 'internal' or 'domestic', and 'external'.

Enactments and laws may be national (or municipal) or international; so may the execution and administration of laws; and there is national or municipal justice and international justice.

It is not difficult to understand why the function of international justice attracted but little attention in Locke's time and why he classed under one head the exercise of all functions affecting other groups (though, as we have seen, he

functions by all the members of the group is possible only in the case of a very primitive community. The popular assembly may deliberate and decide upon a law, an enactment prescribing certain conduct, at all events when the matter is a simple one. It may deliberate and decide upon general policy towards another group, a declaration of war, and the conclusion of a treaty of peace. It may also deliberate and decide, in a simple case, the question of an alleged infringement, of a crime or breach of civil obligation. Finally, it may in very special circumstances execute its decision by collective action, e.g. by stoning the offender. But it is, in the nature of things, beyond the power of a popular assembly to exercise regular, everyday, executive functions, to pronounce competent judicial decisions, or to draft and pass laws. Hence, as groups increase and develop we find specialization and differentiation playing a part in the constituting of organs to exercise the separate functions.

The process of separation assumes various forms. Montesquieu appreciated this and in *L'Esprit des lois* he tries, somewhat cursorily, to explain it. As regards method, his book leaves much to be desired; but when it comes to analysis his precision is remarkable. One doctrine contained in the book has exercised a tremendous influence both on literature and on history, namely the celebrated doctrine of the Separation of Powers. This runs as follows: in a properly constituted state the three different functions should be allotted to three different organs, their three fields of operation to remain strictly separate. Why are the fields of operation to be kept separate? Because unless this be done there can be no political freedom: 'A citizen's political liberty is that peace of mind which comes when each man believes that he is secure. For such liberty to be

possible, the government must be so constituted that no citizen has cause to fear another.'[1]

The doctrine of Separation of Powers subsequently gained wider acceptance than any other of its kind. Montesquieu became the oracle which the Fathers of the Constitution consulted as a matter of course,[2] and his prescriptions were carried out to the full in the Constitution of the United States of America. Other constitutions of more recent origin likewise show traces of its influence.

The idea of a Separation of Powers is, as is apparent from the above, based on Montesquieu's view that the State has a particular *object*, that of ensuring political freedom; this he more particularly describes as giving the citizen a sense of security and peace of mind. Are we justified in sharing this assumption? Is it a foregone conclusion? This brings us to a much discussed problem of political theory, the problem of the object of the State.

[1] *L'Esprit des lois*, Book I, ch. vi.

[2] 'The oracle who is always consulted and cited on this subject is the celebrated Montesquieu', writes Madison. 'If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.' *The Federalist*, No. XLVII, London and New York, 1922, p. 245 et seq.

CHAPTER III

THEORY OF THE OBJECT OF THE STATE

THE nature of a state's object has a very important bearing on its constitution; and failure to appreciate the connexion and to give it due significance is bound to impede the study of our subject. It is unfortunate that works on constitutional law, especially those dealing with positive constitutional law, often omit to take this factor into account. Obviously, when the object is the acquisition of as much power as possible, the organs of the state will be different in point of constitution, operation, and mutual relationship from what they are when Montesquieu's 'political freedom, the citizen's sense of security and peace of mind' is aimed at. In the last chapter the interconnexion between object and method of organization was made amply clear.

A remarkably consistent exposition of this line of reasoning, as it affects the special group called the State, is to be found in a very ancient Chinese work on political science, which was made available to the Western world a few years ago when Professor Duyvendak of Leiden published a translation and commentary.[1] It is a treatise attributed to one Yang, Lord of Shang, a minister of one of the dynasties. We have in it what is in fact the most consistent exposition of the theory of power as the object of the State which has ever appeared on paper. Shang Yang distinguishes very deliberately between the *State* on the one hand and the *People* as a group of individuals on the other; he draws a clear-cut distinction, as a matter of principle,

[1] *The Book of Lord Shang. A Classic of the Chinese School of Law*, Leiden, 1928.

between the power of the State and that of the People. If you want a strong, powerful state, his argument runs, you must have a weak and indigent people; make the people strong and rich, and the state will be weak. 'A weak people means a strong state and a strong state means a weak people. Therefore a country which has the right way is concerned with weakening the people.'[1]

The sole object is to make the State powerful, and this can be achieved only by making the army strong, efficient, abstemious, and ready to face danger. Culture is a disadvantage: 'If in a country there are the following ten evils: rites, music, odes, history, virtue, moral culture, filial piety, brotherly duty, integrity and sophistry, the ruler cannot make the people fight and dismemberment is inevitable, and this brings extinction in its train. If the country has not these ten things and the ruler can make the people fight, he will be so prosperous that he will attain supremacy'.[2] 'A country that has no strength and which practises knowledge and cleverness will certainly perish, but a people in fear, stimulated by penalties, will become brave, and a brave people, encouraged by rewards, will fight to the death.'[3]

It sounds paradoxical that the things which make life worth living are described as 'evils', as 'parasites', and as 'lice' tending to weaken the State, but if we are to understand this doctrine and its origins we must allow for the circumstances in which it came into being and consider the man with whom it is associated. The book was written in the fourth and third centuries B.C., the period known as that of the 'Fighting States'. It was a time of confusion and unrest. The power of the central authority, the 'Son of Heaven', had become merely nominal. The feudal lords

[1] Ibid., p. 303. [2] Ibid., p. 199. [3] Ibid., p. 201.

had become practically independent, conducting themselves as sovereign princes, continually at war with one another and arrogating to themselves arbitrary powers.[1] In brief, the Chinese world was passing through times which strongly resembled that period in Western history when the authority of the Emperor, nominally the successor of the Roman Emperors, had dwindled away to nothing.

It was just at this time, in an Italy rent by dissension and sorely afflicted by reigns of terror, that Macchiavelli's famous *Il Principe* saw the light of day. This book also visualizes the State as nothing more or less than a power-organism, and government as the technique of acquiring and utilizing power. Here again we find ideas about the meaning of virtue, humanity, and philosophy which are quite out of the ordinary; ideas so cynical as to appear almost paradoxical. The Prince, the ruler of the State, must be able to assume both the nature of the fox and that of the lion. He must be a fox so that he may recognize traps, a lion so that he may frighten wolves. Princes who confine themselves to displaying the qualities of the lion are unfit for their work; it follows that a prudent ruler may have to break his word when keeping it would prejudice him and when the circumstances which caused him to give it cease to obtain.[2] If men were good this precept would be bad, but since they are bad the precept is good. Any man who seeks to be perfect among so many who are imperfect is bound to perish, sooner or later. To Macchiavelli, the virtuous ruler appears to be some extraneous matter which is foreign to the system and which should accordingly be eventually expelled. A Louis the Pious is unfit to rule. And Macchiavelli has a low opinion of philosophy, especially

[1] *The Book of Lord Shang*, p. 75 et seq.
[2] Ch. xviii, 'In what manner princes ought to keep their words'.

that which concerns the State. When he says: 'And many Principalities and Republiques have been in imagination, which neither have been seen nor known to be indeed', the allusion is presumably to the Platonic theory of the State then much in vogue in Florence. His line is realism and nothing but realism; this is the only way in which anything is to be learned about the State which will be of any use to any one—'any one' meaning the ruler.[1]

Undoubtedly Shang Yang's theories bear some resemblance to those of Macchiavelli; but they constitute, one might say, a more austere and self-contained system. Towards the end of his observations, Macchiavelli introduces an element which is not really in keeping with his system: the prestige, honour, and well-being of the Italian *people*, which was undergoing severe suffering owing to dissension, confusion, and discord. Thus the power-organism is given an object outside itself, namely the honour and welfare of the Italians; this makes the object of the State something different from that of power for the sake of power.

Shang Yang's doctrine does not go as far as this; the object in his view is the acquiring of power on the part of organized authority for its own sake, for the benefit of the ruler and of those organs of state which serve him, his officials. Well-being, pleasure, education, and national culture are sacrificed to the power of the State. The whole system is planned on these lines; it is a system of honours and (not too generous) rewards for military and civil servants; a system in which agriculture (which ought not to be too successful) is given first place; a system of severe but equal punishments, impartially awarded and lucidly prescribed; a system with a strict hierarchy. One detects the outstand-

[1] Ch. xv.

ing features of the Napoleonic State: the severe penalties prescribed by the Penal Code; the official hierarchy; 'la carrière ouverte aux talents'; the agricultural population as a recruiting ground for the powerful army; and Napoleon's rooted antipathy towards 'les idéologues'.

Yang's character is drawn as that of a man of action, without scruples when it comes to choosing means to attain given ends; one who, when necessary, rejects older institutions and is ready to experiment with new ones; an efficient organizer and a successful if unscrupulous strategist; a large-scale *condottiere.*[1]

The picture is a remarkable one; we are shown a hard, austere mass, like a rock of granite;[2] there is ruthless consistency, and the general view is more Eastern in its conception than the product of Macchiavelli's supple mind.

Practical applications of this system of power are to be found in the histories of such mighty autocrats as Attila, Genghis Khan,[3] and Tamurlane—brilliant organizers and strategists, rulers who amassed power by sheer strength of will, perspicacity, and determination, who planned and

[1] Cf. the remarkable conversation between Prince Hsiao's counsellors, p. 167 et seq. Yang says: 'I have heard it said, that he who hesitates in action, does not accomplish anything, and that he who hesitates in affairs, gains no merit. Let Your Highness settle Your thoughts quickly about altering the laws and perhaps not heed the criticism of the empire.' . . . 'Therefore, a wise man creates laws, but a foolish man is controlled by them; a man of talent reforms rites, but a worthless man is enslaved by them.' Yang's end was like that of so many *condottieri*; when his patron died the numerous enemies whom his severity and bad faith had made him set upon him, and he was put to a miserable death.

[2] 'There is something of the terrible grandeur of the forces of nature in the crude sentences, which with their endless repetitions are as crushing as sledge-hammers', says Prof. Duyvendak, op. cit., p. 88.

[3] For this see Harold Lamb, *Genghis Khan, the Emperor of All Men*, 4th ed., London, 1931. The laws of Genghis Khan are on p. 214 et seq.; as to his ruthless slaughter, see p. 209 et seq.

carried out their projects, destroyed regardless of consequences whatsoever opposed them, and were indeed 'scourges of God'.

It is the political theory of the man of action, of one who believes in action for action's sake, regardless of any higher object; and, for this reason, of the man of limited vision, the vision of those whom Plato describes as having their eyes fixed to the ground. It follows that it is a completely unscientific theory.

For when the question is put 'what then?' a theory of this type cannot supply an answer. Let us assume, for the sake of argument, that the object is achieved; that the whole world has been successfully subjugated and systematically organized, and that the whole earth lies at the feet of the conqueror: we may well ask, what then? For what purpose and reason is power to be exercised henceforth? Is it to provide enjoyment and pleasure for the conqueror? That would indeed be a very poor object, an object to which the means employed are out of all proportion: the capacity of one man or a few men for enjoyment is very limited. Again, all the trouble of conquest and the sacrifice of myriads of human lives could hardly be necessary in order to give one mortal or a few mortals the feeling of continued *plenitudo potestatis*, the revelling without end in a sense of power. That, too, would be a very poor object, apart from the fact that psychological reasons make its achievement impossible owing to the operation of the law of satiety.

So this cannot be the answer. But if one says 'this complete concentration of power is of great benefit to *humanity itself*; it serves the welfare and happiness of all, because it militates against unrest, destruction, and devastation, and offences against life and property', this at once puts quite a different complexion on the matter. For then power *in*

itself, as power, is no longer the sole object: the organized power comprising all the world is now a means to a different end. What this end is itself differs according to circumstances. It may be the happiness of all, or the happiness of the majority—'the greatest happiness of the greatest number', the Utilitarian principle—or perhaps the maintenance of the rights of every living creature.

World power with this kind of object has indeed found apologists. Among them was one of the greatest intellects of the Middle Ages, Dante, whose plea appears in his *De Monarchia*. In this treatise Dante works out the thesis that all countries should form a single State under one ruler or monarch, the Emperor: not indeed for the sake of power, as an end in itself, but rather because God's purpose for man would best be fulfilled by this means. Man's purpose is the full development of man's intellectual faculties.[1] It is clear that humanity will best apply itself to this task practically peculiar to itself, in peace and quietness.[2]

Now peace and quiet are impossible when there are separate concentrations of authority in the hands of independent rulers, for the latter are bound to fight one another. It is therefore essential, if the world is to enjoy the most favourable conditions, that there should be monocracy, i.e. one single empire. The contention is supported by other arguments typical of the scholasticism of Dante's times, which we omit. For the purposes of political science the argument reproduced above is most to the point.

This is another theory which can best be appreciated if we bear in mind the circumstances in which it was evolved.

[1] 'Satis igitur declaratum est, quod proprium opus humani generis, totaliter accepti, est actuare semper totam potentiam intellectus possibilis'. Caput iv.

[2] 'Patet quod genus humanum in quiete sive tranquillitate pacis ad proprium suum opus liberrime atque facillime se habet'. Caput iv. 7–9.

Dante (1265–1321) lived at the time when the bitter struggle was raging between the Guelphs and the Ghibellines. He was a citizen of Florence and held high office in that State. Pope Boniface VIII sought to annex Florence and all Tuscany to the Papal State, and in pursuit of this plan exploited the Guelph-Ghibelline quarrel. Finally the Pope invoked the aid of Charles of Valois, the French king's brother, to give the Guelph faction the victory. The leaders of the other party, the pro-Emperor Ghibellines, including Dante, were exiled and their estates confiscated. It was, as can be seen, a period of great confusion and misery, brought about by the disruption of authority and by petty feuds, and in this it compares with the age of Shang Yang. But there is this fundamental difference between the theories of Shang Yang and Dante, that the latter envisages a nobler purpose in setting up authority; in Plato's language, his eyes are not cast down, but look upwards.[1]

If the acquisition, expansion, and use of power are not in themselves to be considered the primary object of the State, there must be some other object. It has been said that the making and maintaining of *law* is that object. Looked at in this way, the State's object is to be a *juridical State*. The State, Kant contends in his *Philosophy of Law*, is the sum total of the population, the relation to each other of the individual members of a Nation (*status civilis*). Such an organization is essential if a large number of people, every

[1] It is fair to say that Shang Yang's theory was considered, by later Chinese authorities, to represent a deviation from true wisdom and pure philosophy, and regarded as something diabolical. Duyvendak, op. cit. p. 128 et seq. 'So, while profiting from its work, China has rejected the doctrines of the Law School. The gulf between law and ethics created by the Law School was bridged again by restricting law to merely penal law, containing sanctions on the observance of the recognized rites and customs.'

one of whom of his own will naturally does what seems good and right in his own eyes, in entire independence of the opinion of others, are to enjoy *right*. So Kant postulates a State which is to give individuals definite rights. As regards the people, the State is called 'the commonwealth' (*das gemeine Wesen—res publica*), because the common factor is the common interest shared by all of enjoying the civil state (*im rechtlichen Zustande zu sein*). A community or society of this kind, providing the highest possible degree of freedom under law, together with an irresistible force by which to maintain it—in other words a perfectly just political constitution—is the supreme task set by nature to the human race ('*eine vollkommen gerechte bürgerliche Verfassung ist die höchste Aufgabe der Natur für die Menschengattung*').[1] So Kant considers the object of the State to be the making and maintaining of law and the ensuring of the freedom of its citizens.

Now there are various aspects of law and civil liberty. First there is 'constitutional freedom': this, according to Kant, is 'the right of every citizen to have to obey no other law than that to which he has given consent or approval'. Next comes civil equality, which Kant describes as the right of the citizen 'to recognize no one as a superior among the people in relation to himself, except in so far as such a one is as much subject to *his* moral power to impose obligations as that other has power to impose obligations upon him'. This none too lucid formula appears to mean that citizens and governors are one another's lawful subjects and must each regard the other as being in full possession of rights and fully subject to obligations; that the Government should not treat subjects as outlaws and nonentities or dominate them like slaves. Lastly, there is the aspect of

[1] Kant, *Metaphysische Anfangsgründe der Rechtslehre*, 2nd ed., Königsberg, 1798, p. 196.

political independence, i.e. the right of each citizen 'to owe his existence and continuance in Society not to the arbitrary will of another, but to his own rights and powers as a member of the Commonwealth; and, consequently, the possession of a Civil Personality, which cannot be represented by any one other than himself'. The individual must be both governor and governed, must be an independent party in relation to the decision of the community.

As a means to attaining and securing the law and individual freedom here spoken of, Kant accepted the system of the *trias politica* in the sense of a separation of the three powers. (These he called *potestas legislatoria, rectoria et iudiciaria*, and they balance one another.) Yet it was only as a postulate that he accepted it: in his time it was a theory which had hardly been put into practice. Enlightened despotism paid lip-service to the ideas of the *Aufklärung*; but between theory and practice a deep gulf was fixed. Kant was much influenced by the spirit of Enlightenment and entertained a strong antipathy towards Junkerism and absolutism. He held Rousseau's political theories in high esteem, and was in sympathy with their objects, but he did not adopt them without criticism. His State was founded on natural law; he accepted the idea of the social contract, the agreement to form a State; not, however, as an historical fact, but rather as a method of *construction*, a *modus operandi*, a *legal basis* for the State. The original contract 'is properly only an outward mode of representing the idea by which the rightfulness of the process of organizing the Constitution may be *made conceivable*'. (*Der ursprüngliche Kontrakt . . . ist nicht . . . der Akt, wodurch sich das Volk selbst zu einem Staat konstituiert, sondern nur die Idee desselben, nach der die Rechtmässigkeit desselben gedacht werden kann.*)

We see that a 'method of construction' is now postulated: what is there to justify this postulate? Whence, scientifically speaking, do we derive the right to assume *a priori* the existence of this method and this fiction? What makes the assumption valid? What answer can we give to those Fascist apologists who disparage this supposed object of the State as something unreal, who reject these ideas as antiquated and effete theories of the 'liberal' and 'democratic' period which has gone for ever?

We might begin our answer by saying 'your substitute for these theories is, at all events, most unconvincing'. Looked at closely, it is found to be extremely vague; and in particular it tells us nothing about the object of the State. What, after all, is the Fascist account of these matters? The official pronouncement is as follows: 'The Italian Nation is an organism having ends, a life and means superior in power and duration to the single individuals or groups of individuals composing it. It is a moral, political, and economic unit which finds its integral realization in the Fascist State.'[1] This is mere dogma; but some explanation has been afforded. 'In so far as it is embodied in a State, this higher personality becomes a nation. It is not the nation which generates the State; that is an antiquated, naturalistic concept. . . . Rather it is the State which creates the nation, conferring volition and therefore real life on a people made aware of its moral unity.' 'The Fascist State, *as a higher and more powerful expression of personality*,[2] is a force, but a spiritual one. It sums up all the manifestations of the moral and intellectual life of man. Its functions cannot therefore be limited to those of enforcing order and keeping the peace, as the liberal doctrine had it. It is no mere

[1] Art. 1 of the Labour Charter (*Carta del Lavoro*).
[2] The italics are the author's.

mechanical device for defining the sphere within which the individual may duly exercise his supposed rights. The Fascist State is an inwardly accepted standard and rule of conduct, a discipline of the whole person; it permeates the will no less than the intellect. It stands for a principle which becomes the central motive of man as a member of civilized society, sinking deep down into his personality; it dwells in the heart of the man of action and of the thinker, of the artist and of the man of science: soul of the soul.'[1]

The State then has 'ends superior to those of the single individuals composing it', and this sounds well; but what are those ends? This question is of paramount importance, and no answer is afforded by the high-flown and sententious phrases about the State's being a higher expression of personality, an inwardly accepted standard and rule of conduct and a discipline of the whole person and 'soul of the soul'. The main problem remains unsolved: what is the *object* of making these claims on the individual personality, of this complete subordination of the life and soul of the citizen to the State? Is it merely the acquiring of power and prestige for the State, the conquest and subjection of other States, with world power as the ultimate object? If so, then 'the State' must be something more than the *Italian* nation as 'a moral, political and economic unit'. Or can it be that the demand for submission, body and soul, is made with some other object in view? Once more, we must ask what object. Mussolini speaks of the nation 'considered—as it should be—from the point of view of quality rather than quantity, as an idea, the mightiest because the most ethical, the most coherent, the truest, expressing itself in a people as the conscience and will of the

[1] Mussolini, *Fascism, Doctrine and Institutions*, Ardita, Rome, 1935, pp. 12, 13.

mass, of the whole group ethnically moulded by natural and historical conditions into a nation, advancing, as *one conscience and one will*, along the selfsame line of development and spiritual formation';[1] and we might see the State's object in such a 'mighty' idea, whether it be that of a few men or only a single individual. But how, after all, can we show that the idea is 'mighty' in the sense of valuable? Not surely from the simple fact that a single individual or a small number have succeeded in imposing their will on all? This fact, it may be urged, is not necessarily due to the might of the 'idea'; it may be the result of a number of quite different factors and circumstances, the most important among them being dread of the horrors of anarchy and civil war.

The truth of the matter is that the hierarchical organization which is an essential feature of the Fascist State makes the object of the State whatever object is personally decided upon by the leader, the head of the hierarchy. *His* proposal of an object naturally carries most weight; *his* will, as long as the Fascist organization of the State continues and works efficiently, is the will of the State; *his* end is that of the State.[2] Fascist doctrine knows no objective purpose for the State as a matter of political theory; Fascism is relativism carried to extremes. There is a total lack of stability and of any general principle of universal validity, and if Fascism were the last word on the subject, political theory, as a science, would be doomed.

As yet, however, we are not driven to this sceptical conclusion, even if we agree with the criticism launched against 'liberal' political theories. I use the plural because

[1] Mussolini, op. cit., p. 12.

[2] In a speech delivered on the 4th August 1934 Mussolini said: 'We must become a military, even a militarist nation; I would even add, a bellicose nation. The political, economic and spiritual life of the country must be based on its military needs.'

it is scientifically unsound to speak of *the* liberal political theory; there are a number of such theories. To lump together 'liberal', 'democratic', and 'socialist' political doctrines is from a scientific point of view far too facile;[1] in fact they vary considerably. Any one who fails to distinguish between utilitarian political theory and, say, a Gladstonian outlook, between the Althusian theory, Kant's doctrine of the 'legal' State, and Karl Marx's conceptions, between Woodrow Wilson and Lenin, is not doing justice to the material he handles. It would be better to limit oneself to 'action and sentiment',[2] and dismiss science with the supreme contempt which the man of action is accustomed to entertain for all 'ideologies'. Shang Yang's doctrine, which classes science with 'lice' and parasites meriting extermination, is indeed more consistent; and, incidentally, more subtle.

But to revert to Kant's theory, it is indeed open to serious criticism. The conception of the State as a *legal* State in the restricted sense mentioned, the idea that its sole object is to bring about the 'civil condition' (*'den rechtlichen Zustand'*), is a one-sided one. We have seen that the State is to be regarded as the organism which provides for common interests, of which the maintenance of law and order is one, but not the only one. The chief common interest is defence against danger threatening from outside. Now the organism formed to promote this often concerns itself further with the next most important common interest, that of defence against dangers which threaten the group from within, especially the danger of members resorting to self-help, 'taking the law into their own hands'. It should be noted that, in the early stages of

[1] See Prof. Alfredo Rocco, 'Political Doctrine of Fascism', in *International Conciliation* for October 1926 (No. 223) at p. 11.

[2] Ibid., p. 10: 'Fascism is above all action and sentiment and . . . such it must continue to be.'

legal development, such self-help is a recognized institution. The group as such will take action only when its vital interests are prejudiced, when the facts are such as to expose it to external dangers; it will only act against such things as treason, blasphemy against the gods, violation of sacred places, magic, &c. Remedial action to deal with offences against the property, lives, or honour of individuals is considered to be a matter for the individuals themselves or their relations. Thus the 'blood-feud' is an established institution at the primitive stage of development. But experience shows the considerable dangers inherent in this institution; feuds and vendettas might run rife like a consuming fire, and whole generations would become their victims. And so as soon as military necessity has brought about the institution of more permanent leadership, this, if exercised by men of strong characters and capability, assumes the function of combating self-help, of maintaining internal order and promoting the institution of a regular and impartial judiciary. Justice becomes a public service.

There are other dangers which may threaten the group. In the author's own country, the Netherlands—the 'Low Countries by the Sea'—the sea and the rivers constitute a never ceasing threat, a threat the gravity of which is appreciated by the authorities concerned, whose task it is to take defensive measures.

At a later stage internal dangers are recognized as such and measures are taken, with some degree of success, to combat them. Take, for instance, infectious diseases which cause epidemics. At first people felt powerless against these dangers; isolation of a few cases in leper hospitals was the only remedy. But when medical science had discovered the true nature of the infectious disease and it was understood where the real danger threatening the group lay, effective

enactments were made to deal with it. Public Health became one of the concerns of the State; national and local government services were instituted to preserve the health of the community.

A fresh set of collective interests demands attention when, owing to the growth of the group as described in Chapter II (p. 40, *ante*), the need for transport facilities makes itself felt. It then becomes part of the State's duty to provide, and to secure the safety of, highways and trade routes. When ordinary national authorities prove unequal to this task it is taken in hand by such bodies as the Hanseatic League, a corporation formed by influential commercial towns. The League itself could not last, because its organization ran counter to the principles of State organization in various respects; but with the failure of institutions like it, it becomes the State's duty to take over the work of providing and protecting trade routes.

Later, there is a further extension of the provisions made for common economic interests. The granting of charters to the 'towns of the staple' and the operation of Colbert's system in France illustrate the great concern felt by the authorities for the economic welfare of members of the group. At a still later stage this concern comes to be regarded as a disadvantage. In modern times, especially in the period following the Great War, and during and since the 1931 economic depression, it has increased again. The various Marketing Boards created in Great Britain by Parliament bear witness to this.

The Industrial Revolution of the nineteenth century brought in its train the evils of overwork, inadequate wages, and insufficient provision for the needs of the working classes. Such public services as factory inspection, national insurance, and housing were then instituted.

We thus see that the State gradually found more and more objects, and it will be more accurate to speak of the *objects* of the State than of its *object*. But further consideration shows that all these objects fall within the scope of Aristotle's comprehensive and expressive formula: 'the State, while it *comes into being* for the sake of mere life, *exists* for the promotion of the good life.'[1] The first duty of the State is to preserve human life, to make life *possible* for individuals. Once formed, however, the State continues its existence for the sake of making life good, beautiful, and pleasant. Looked at from a different point of view, the matter can be put in this way: the State organism is the form in which the group endeavours to adapt itself to its circumstances in the best way possible. This applies not only to the *polis*, the city State of Aristotle's time; it is equally valid for the modern State. The objects of the modern State are many and diverse, as we have observed; this is shown by the very names of the various government departments. But all these objects fall within the scope of the general formula: the numerous and various activities are all calculated to preserve life, and to make the lives of citizens safer, healthier, better, and more beautiful. The modern State displays more vividly than did the ancient State known to Aristotle, more clearly than even the glorious and many-sided Athenian State, the general object as being *εὖ ζῆν*.

Now this objection may be advanced: true; but the ultimate object of all these enactments and provisions *is* to carry out the law, using the term 'law' in a higher sense than that of mere positive law: that is to say in the sense of the citizens' abstract right to develop their capacities to the utmost, and bring out the best in themselves. I do not

[1] *Politics*, I, c. 1, 8: *γενομένη μὲν οὖν τοῦ ζῆν ἕνεκεν, οὖσα δὲ τοῦ εὖ ζῆν.*

consider the objection a valid one. When the State provides, by the national budget, a considerable sum of money for the construction or improvement of a canal or a bridge, for the purchase of pictures or sculptures for national museums, or for subsidies for an orchestra, opera house, or theatre, can it then be said that the State acts, in this case, for the purpose of fulfilling the law? I suggest that it would be an abuse of language so to describe its activities; it would serve no good purpose, and be unscientific. In doing these things the State fulfils not its task of enforcing law but its task of promoting prosperity and culture. It may be said that in providing for these interests the State should always have regard to *justice*. For instance, when promoting prosperity by constructing canals, bridges, roads, and railways it may not limit its sphere of operations to a particular *part* of the country. It would be wrong for the State to give one district only the benefit of wide roads and good bridges; it must distribute its favours equally. When subsidies are granted, it would be unfair to give preference to particular orchestras and theatres. When laying out public money in the interests of art it would be wrong to benefit certain sections of the population to the exclusion of others; for this reason it is often made a condition of the grant that a specified number of 'popular' performances be given so that less affluent members of the population may obtain their fair share of the pleasure made available by contributions from the national exchequer. This, it is thought, is only just; and it is, in fact, the usual practice.

But this is not, I submit, the same thing as is conveyed by saying that the State fulfils its object of law-making by advancing these interests. The truth is that when pursuing the objects of promoting prosperity and advancing culture (and, incidentally, when pursuing the objects represented

by national defence, public health, housing, &c.) the State necessarily takes certain measures, has to act; and the principles of justice and fairness *govern* the taking of these measures. The object of the State is far wider and more extensive than that of maintaining justice and enacting law; but in carrying out that wider object the State is, as appears, bound by the principles of justice.

This brings a new problem in its wake, that of the relation between the State and the law. This problem requires further investigation, and I will leave it aside for the moment in order to discuss another matter, which arises out of the diversity of specific objects pursued. It is this: as the collective interests which have to be provided for grow in number, a certain conflict is bound to occur between the several claims made on the central authority. It is obvious from what has been said—especially with regard to the formation of the group—that, say, the demands of efficient provision for defence differ considerably from those of provision for justice. The organs which are entrusted with the two tasks must be differently constituted if they are to function satisfactorily. Even when the process of differentiation has not been carried very far the various demands may conflict. As a case in point, let us take the feudal State. Its economic structure is on the primitive side; 'natural' economy prevails. From the military point of view, on the other hand, it is fairly efficient. The essence of the system is that the heavily armed mounted soldier, *miles* or knight, is remunerated by the use of land for faithful military service which he must be ready to perform at a moment's notice. When the territory concerned is constantly exposed to the threat of sudden invasion, this arrangement meets the requirements. But it is obvious that at times when the central government is weak and incompetent this form of

organization opens the door to the creation of different centres of power, to the disruption of authority, to those centres taking the law into their own hands, and consequently to the creation of feuds. The final result is that the judicial functions of the State are exercised unsatisfactorily.

To take another example: as technical military knowledge increases, military service tends to become a specialized function, a profession. In wealthy commercial communities, the standing army makes its appearance. Citizens prefer to pursue their own occupations, finding them more congenial, more profitable, and less dangerous. But the experiment is found to be fraught with grave risks. Suppose the man in command of the forces to be a capable and resourceful leader, whose successes in the field have given him a measure both of actual authority and of popularity. In these circumstances it becomes likely that, as official head of the national defence service, he may use his unofficial but actual power for the purpose of obtaining universal political authority. In other words, the general becomes the ruler, the dictator, Caesar, or Emperor. In the history of the author's own country, the events which followed the termination of the Eighty Years' War, when Prince William II, Captain-General of Holland, attempted a *coup d'état*, caused Johan de Witt to publish a pamphlet in which that astute statesman cited many historical examples of the folly of appointing commanders for life. Oliver Cromwell's career is another illustration of the point.

A third and more modern example of the difficulty is the problem which arises when the work of administrative departments is hampered by existing law and the departments concerned fall foul of the judiciary. In some countries the institution of *droit administratif* is the means by which solution is attempted. In Great Britain the nature of the

conflict was alluded to by Lord Justice Bowen in 1893 in these words:

'In a free country the very essence of such a system [that of local taxation] must be that there should be an appeal to some body who can say whether those officers [the 'overseers'—'parochial ministerial officers empowered in the first instance to place values on hereditaments for the purpose of taxation in the broad sense'] are doing what is just. If no appeal were possible I have no great hesitation in saying that this would not be a desirable country to live in, where every parochial officer might do as he liked in this matter. . . . Therefore it is of the essence, the pivot of the system, that there should be a right of appeal.'[1]

More recently, the conflict became more acute, and the attempt to solve it by delegating to Departments of State not only legislative but also judicial functions became the subject of a protest by Lord Hewart, Lord Chief Justice of England, in his book *The New Despotism*.[2] To quote from the opening words of Chapter III:

'In consequence of the increasing demands of the departments for legislation giving them the detailed control of matters connected with local government, health, education, industry, housing and so forth, Parliament is, it is said, overburdened, and quite incapable of dealing adequately with the subject upon which it is invited to legislate.'[3]

In the Netherlands the nature of the difficulty is illustrated by a provision which confers a certain measure of immunity from legal proceedings on officials charged with the duty of flood prevention. The recourse to the provision in question emphasizes the disasters which might follow if this work were liable to be interrupted by litigation.

It is only by degrees, and often after several experiments

[1] In *The Queen* v. *Justices of County of London and London County Council*, [1893], 2 Q.B. 476, C.A., at p. 492.

[2] London, Ernest Benn, Ltd., 1929. [3] p. 59.

conducted in unfavourable circumstances have jeopardized the very existence of the group, that more or less suitable forms are found in which to provide for different interests. By these forms the group adapts itself to changing circumstances, that is to say to the conditions under which it has to exist. The more vigorous, hardy, and capable groups tackle those conditions themselves and try to improve them; in the last resort this may be called a form of self-adaptation. Again, one group will often profit by the results obtained by another and take them over, e.g. by imitating a foreign system of law, with varying degrees of success. This brings us to the question of the different forms of States and Governments.

CHAPTER IV

THEORY OF THE FORMS OF STATES AND GOVERNMENTS

1. MONARCHIES AND REPUBLICS DISTINGUISHED

AS soon as we begin to examine the different forms of States we come across a time-honoured classification which divides them into two kinds: (*a*) *Monarchies*, and (*b*) *Republics*. 'All States are either Republics or Principalities (*principati*)' are the opening words of Macchiavelli's classic work *Il Principe*.

Macchiavelli makes 'State' the genus, 'republic' and 'principality' the species. The conventional use of the generic expression 'State' dates from his period. The words *lo stato* appear to have been first used in reports made by ambassadors of Italian republics in the fifteenth century, and had as their primary meaning the entirety of the permanent *offices* of a given government. A secondary meaning was the *holders of these offices*, the *rulers with their followers or adherents*; and the term finally came to designate the territory over which the rule extended considered as a unity, the *country*. The expression *stato dei Medici* is used, but so are *stato di Firenze* and *stato della Chiesa*. Thus the word 'state' came to mean the *system of organized public functions and organs operating in a specific territory*.

The expression, then, is of fairly recent origin. The Greeks spoke of πόλις; for them the State was identical with the city; 'politics' means 'appertaining to matters of *State*'. They also spoke of τὸ κοινόν, which emphasizes the *common* character of the provision for interests, as do the Latin *res publica* and the English 'commonwealth'. The German *Reich* means 'dominion', like the *imperium* of the

Romans. 'Country' or 'land', the expressions commonly used in medieval times, lay the emphasis on the territorial aspect, which is easily explained by reference to the feudal system.

The history of the meanings borne by the word reflects, as is to be expected, part of the history of the various forms of political organization. The makers of language seize upon the particular feature in a complex of phenomena which strikes them as dominant.

It may be remarked here that the Union of Utrecht of 1579, which was the foundation of the Dutch Republic, did not use the equivalent of the word 'State' to describe the genus, but used the word 'lands' (e.g. earldom and lands of Holland, Zealand, Utrecht) when no specific term was available which would meet the requirements of the case. But the American Articles of Confederation, a document of similar purport, speak of 'States'. The Weimar Constitution of 1919, on the other hand, favours the word *Länder*; but the choice of the neutral expression was deliberate, the object being to leave open the question of the status of the units concerned: an example of political refinement and astuteness, not of political *naïveté*.

The genus, then, is 'State', and the species 'monarchy' and 'republic'. Jellinek, in his *Allgemeine Staatslehre*, considers this division still the most important and the fundamental one, and says that it is demanded by the 'main *principium divisionis* applicable to political constitutions'.[1] Personally I doubt whether this time-honoured principle of classification can *at the present stage of development* still be considered fundamental. I incline to the view that we are here up against an example of the way in which the misguided persistence of a classic scientific division, of dogma enhanced by emo-

[1] Op. cit., p. 665.

tional ideas, continues to produce effects out of all proportion to the truth it contains. I will proceed to give reasons.

When we subject the criteria applied by this division to examination, we at once find the greatest possible divergence of expert opinion. It is not merely a matter of shades of opinion or of detail; the differences relate to matters of substance. Jellinek's criterion is *the method by which the will of the State is formed.* There are, he holds, two possibilities only. The highest will, which sets the State in motion, is, according to the State's constitution, formed either in a purely psychological—which means a natural—manner; or else in a juridical—which means an artificial—manner. In the former case, the process of forming the will is completed within a natural, physical person, and the will of the State so formed is, accordingly, revealed as a natural, individually determined, will. In the latter case the will of the State is the resultant of a legal process (*eines juristischen Vorganges*) consisting of expressions of will by a number of natural persons, the consequence being that it is not revealed as the will of one specific visible living person, but only as the will of some corporate entity with merely legal reality. 'There are two possibilities only when we make our main division of States: natural will and legal will, the latter being will obtained from natural will by a legal process, in a manner prescribed by constitutional law.'

States which answer to the first description are monarchies. A monarchy is a state directed by a natural will. This will must be supreme in law, and not derived from any other will.[1] States which answer to the second description are republics. In a republic 'the supreme authority is never the product of a purely psychological process; it is always the will of a corporate entity, be it smaller or larger.[1] This corporate

[1] Jellinek, op. cit., p. 669.

entity is a purely legal fiction and is to be sharply distinguished from the persons composing it. Its will is formed, as already mentioned, as the resultant of the wills of the individuals, in accordance with the method provided for in the constitution. This explains, says Jellinek, why the republic is something which simple minds find it more difficult to appreciate than the monarchy, in which the whole of the State's activity can, as it were, be perceived by the senses.[1]

The main division is then subjected to subdivision, with which I shall not now deal.

It need hardly be pointed out that if this criterion be applied all forms of states which are, in ordinary political parlance, consistently called constitutional monarchies would belong to the species 'republic'. In other words, the vast majority of modern monarchies, in the sense of the word used colloquially and in political theory, would in reality be 'republics'; in this class would fall Great Britain, Sweden, Norway, Denmark, the Netherlands, and Belgium. For in all these States the forming of the will of the State is the work of a *number* of 'natural' persons. Now any one is, of course, free to divide and to regard things with an eye to any characteristic he pleases; all that logic demands is that in subsequent discussions he shall adhere strictly to the method chosen. But it requires, in my opinion, very little argument to show that as regards modern constitutions this method of division and definition is most unpractical, conducing as it does to confusion and misunderstanding rather than to enlightenment. Nor does Jellinek draw his inferences properly. He calls the German Reich of the time a 'republic',[2] which is a somewhat unusual description to apply to an Empire, despite the fact that he can invoke no

[1] Ibid., p. 711.

[2] Ibid., p. 712 et seq.

less an authority than Bismarck. (Bismarck had indeed used in a speech the expression 'in a way a republican head' (*gewissermaßen eine republikanische Spitze*) of the 'associated Governments' (*verbundete Regierungen*); but he was speaking of the North German Confederation, three years before the Empire was founded.) But he calls Great Britain a monarchy and supports this view by reminding us that the power which sets the State in motion and maintains it is legally vested in the Crown. He expressly concedes that in contemporary Great Britain Parliament is the centre of State power.[1] It is Parliament which makes the laws, to which for some two centuries the king has never refused assent. The Cabinet, a committee of the Parliamentary majority, is, it is true, *formally* appointed by the King, but is *in reality* nominated by Parliament; and the leader of the majority in the House of Commons, being appointed Prime Minister by the Crown, selects the other members of the Cabinet from the majority and submits their names to the King for appointment. The Cabinet actually appoints all officials; further, it exercises the royal prerogatives because the Crown no longer—at all events since the reign of Queen Victoria—offers any opposition worth mentioning to the Cabinet's proposals.

This, then, is clearly *not* the case of the will of a single, natural person, the monarch, setting all the machinery of the State in motion. The essential features postulated by Jellinek himself are missing. Indeed, the characteristics with which we are now dealing are those he ascribes to a republic: the will of the State is formed as the result of a legal process applied to the wills of a number of persons. It would follow that Great Britain was a republic. No, says Jellinek, in spite of all this, the supreme direction of the State is entirely in the King's hands. For he alone may set

[1] Jellinek, op. cit., p. 680.

Parliament to work, as Parliament has no right of assembly; he is still *caput, principium et finis parliamenti*. If, in the face of political pressure, he refuses the royal assent to a bill, there is no power on earth which can *legally* compel him to give it; without his will, the whole machinery of legislation must break down.[1]

So Jellinek finds in the old *form*—the unreality of which he has in terms recognized—the characteristic he postulates for monarchy. This is scientifically indefensible. It means taking the shadow for the substance, fiction for fact; a purely scientific inquiry, which seeks to ascertain truth, should never do this.

Hence it is not difficult to see why other scientific inquirers have sought to find a different criterion for the distinction between monarchies and republics. We can readily understand why Duguit, whose avowed intention it is to be the most realistic and purely realistic of modern political theorists, takes this course. Rejecting the way in which the will of the State is formed as the proper criterion, Duguit makes the method by which the head of the State is indicated the distinguishing characteristic of the two forms. 'Monarchy is the form of government in which there is a hereditary head of the State; a republic that in which there either is no such head, or if there is, in which he does not inherit his office.'[2]

If the head of the State be indicated by reference to a settled hereditary system the State, according to this method of classification, is a monarchy; if not, it is a republic. Note that Duguit speaks of forms of *government*, not of *State*. The terminology of Constitutional Law is not uniform on this point. It is usual to call the division we are discussing

[1] Ibid., p. 681.

[2] *Traité de Droit Constitutionnel*, Part II, p. 607 of the 2nd ed., Paris, 1923.

a division into two different forms of State, as Jellinek does; a difference of forms of government is generally taken to mean difference in constitutional forms to be found *within* the ambit of the two main classes, in other words to refer to a *sub*division; e.g. 'republic' would include both republics with direct government (by referendum, or the popular initiative) and those with representative government; both republics with a parliamentary system of government and those favouring the system of a separation of powers (such as France and the U.S.A.). But some authorities adopt the nomenclature used by Duguit, and the expression 'form of *State*' then covers confederations, federal units, and independent unfederated States, which I shall discuss later. The choice of terminology is not a vital matter, but it is, of course, important to avoid using the same term in two different senses. It would make things easier if all writers were to use the same expressions for the same things.

Duguit's notions of monarchy and republic obviously do not correspond to those of Jellinek. In Duguit's scheme of things states in which the ruler is elected are not monarchies. Thus the Holy Roman Empire in which the 'Roman king' was chosen by Electors, would be a republic. Poland, according to this method of classification, was not a monarchy but an aristocratic republic which conferred the title of 'king' on the heads of the State which it gave itself. Indeed, as Louis Delbez demonstrated in an article in the *Revue du droit public*,[1] even Imperial Rome would have been not a monarchy but a republic, because its ruler, the *princeps*, was not appointed by reference to a settled hereditary order, but was formally invested with his powers by the

[1] Louis Delbez, 'Recherches sur la classification des formes politiques,' in the *Revue du droit public et de la science politique*, 1929 volume, p. 389 et seq.

senate in accordance with the so-called *lex curiata de imperio*. Further, there was in fact no hereditary right; the army and the praetorian guard appointed the successor.

This conclusion is a very remarkable one; indeed, at first sight it seems hardly acceptable. The Western world's classic example of absolute autocracy would not answer to the description of a monarchy. Jellinek rightly includes electoral monarchies (*Wahlmonarchien*) among the monarchies, according to his system. In the electoral monarchy, which is a sub-species of the species monarchy, 'the Throne, when it becomes vacant, is filled in accordance with a legal proceeding; in hereditary monarchies the monarch is appointed from a particular family, i.e. from the reigning dynasty, in accordance with a method determined by the Constitution, the Succession law'.[1] The electoral monarchy may require special 'originating organs' (*Kreationsorgane*), but the function of this machinery is limited to election. Once the election is over, its work is done. After that it occupies a subordinate position in relation to the monarch. There is, in this case, no 'representation' of the electorate by the elected; he becomes their lord paramount as soon as he is elected.

Thus the main division—the 'fundamental' division, according to Jellinek—is a matter on which opinion is divided at the very outset. It is not merely that the conceptions and definitions of the several authorities do not correspond; what is more serious, from the point of view of science, is that each definition leads to conclusions which appear to be unacceptable in themselves. This is an extraordinary state of affairs. But there is, I think, an explanation. The reason is to be found in the fact—and such occurrences are not uncommon—that legal terms have remained un-

[1] Op. cit., p. 691.

changed while political and legal conditions have undergone substantial modification and the whole position has altered. Take such a term as 'police', derived from πολιτεία, which meant 'the affairs of the State'; the connotation of the term is now considerably less wide. 'Coroners' had at one time a far more extensive jurisdiction than they now possess; and 'sheriffs' formerly exercised judicial as well as executive functions in England, as they still do in Scotland.

This applies to the matter under discussion. Modification has been of two kinds: in some cases the *function* has changed, in others the *organ* which exercises it. If in the course of discussion the emphasis is laid on the system, quite different results will follow from those obtained when the function is the central topic. In the present British Constitution we find an organ of government, the King, appointed in accordance with a hereditary system, as has always been the case; but one whose function has completely altered. Yet the structure of the system and the title of the organ have not altered; in ordinary parlance the British form of State is still described by the same term, namely monarchy, though the relations between the organs and the system have been fundamentally changed.

In the U.S.A. the executive power is in fact in the hands of the head of the State, the President, who exercises functions which in monarchies, before the institution of ministerial responsibility and the parliamentary system, were to a very real extent exercised by the crowned heads. So in the U.S.A. the formation of 'the will of the State' in executive matters is, in the last resort, in fact the work of a single natural person; there is no ministerial responsibility and no Cabinet system as there is in countries with a parliamentary system. It would follow that, according to Jellinek's test, the U.S.A. would partake more of the nature of

a monarchy than do Great Britain, Sweden, Norway, Denmark, the Netherlands, and Belgium!

Duguit's approach to the subject accords better with modern linguistic usage than Jellinek's; on the other hand, Jellinek's fits in better with the historical forms. This, I think, explains the difference.

But it is unwise to treat the division as one which is fundamental for all times and all stages of development. Regard must be had to the sweeping changes in systems of government which have occurred in the course of time.

In a book on political science by Prof. Otto Koellreutter[1] which came out a few years ago, there is added to the traditionally recognized species of state, monarchy and republic, a third, that of the Authoritarian Leader State. At first, Koellreutter follows the usual method, starting with a dual division, and Section 25 of his book is entitled 'Monarchy and Republic'.[2] Dealing with these two forms he asserts that the real essence of a monarchy found its expression in *dynastic monarchies*. 'But this means that the essential characteristics of the modern monarchy can be understood only by reference to the essentials of the dynasty, i.e. the reigning house in which the office of king is hereditary.' Thus Koellreutter adopts Duguit's criterion; and for present conditions this is indeed, as we have seen, the test which fits in best with contemporary language.

The modern monarchy, Koellreutter writes, is governed by the *principle of inequality* to the extent to which the dynasty stands out above the people politically.[3] The republic, on the other hand, is governed by the *principle of equality*. It is not some intrinsic quality of his nature that

[1] Otto Koellreutter, *Grundriß der allgemeinen Staatslehre*, Tübingen, 1933.

[2] Ibid., p. 119 et seq.

[3] Ibid., p. 121.

raises the republican head of the State above the people; the justification of his political and constitutional position is to be sought in the people itself.[1]

States are thus classified by reference to whether or not they adopt the principle of equality. But after this preliminary exposition the writer goes on to say that for the Authoritarian Leader State (*autoritärer Führerstaat*) the essential differences between monarchies and republics have lost all meaning. For leadership as such is founded not on any dynastic basis, but on the notion of *State authority*; at the same time, it does reject the formal notion of equality.[2]

✓We see that the principle of equality does not, and the principle of inequality does, apply to the *Führerstaat*. But what, we may ask, is the foundation of the inequality attributed, as a matter of principle, to the leader, by virtue of which he 'stands out above the people politically'? Is it founded on election? If so, is it on election by the people or by some official public institution? If that is the case, we fail to see what difference there can be between the Leader and the republican head of the State whose election as 'Parliamentary President' or 'President by plebiscite' (*plebiszitärer Präsident*) was cited by the author on his preceding page as proof of the absence of any intrinsic quality raising him above the people. But if it does not rest on his having been elected, on what does it depend? Is it purely on the fact of his power in relation to the people? This would constitute a challenge, an invitation to measure power—in the last resort by civil war. Or on God's will? But how was His will revealed? What prophet anointed the Leader, as Samuel anointed Saul? And if in fact he be not 'the Lord's anointed', how can the authority of the *Führer* be referred to God's will without blaspheming? However,

[1] Otto Koellreutter, op. cit., p. 124. [2] Ibid., p. 125.

the author in fact leaves the question of the foundation of the Leader's authority an open one. 'The *notion* of State authority' on which he proposes to base the Leadership, can at the very most be but the theoretical foundation of leader's authority in the abstract (and even so the expression is none too lucid); it can never be its real basis. The mere *notion* of State authority provides no clue to the question how the person of the Leader is indicated.

Koellreutter was apparently sensible of this fact, but he extricates himself from the difficulties with remarkable ease. The constitutional forms of the new Leadership, adopted in the nation State, must, he says, needs differ from those of the liberal State. But what he does *not* tell us is what those forms are to be, a glaring omission being his failure to vouchsafe any information as to what form should be adopted for appointing the Leader. We are finally fobbed off with a reference to Hitler's *Mein Kampf*. Koellreuter finishes this part of his survey as follows: 'and according to Adolf Hitler the mission of the National Socialist movement is not to found a monarchy or establish a republic, but to create a German State' (Sect. 380 of *Mein Kampf*). This does not take the matter much further: we want to know what State is to be created. We have seen that there have been several forms of such States; there has never been just a 'German State'. Perhaps the writer has in mind the raising of the chieftain on the shield—but that would be popular election, in primitive and graphic form. In the modern State, organization would be necessary. The *Führer* himself had recourse to a kind of retrospective plebiscite after the *coup d'état* which followed President Hindenburg's death. This was a gesture in favour of the republican form of State: the constitutional form resorted to is merely a feeble imitation of the republican (*volksstaatlich*) system.

Hitler, incidentally, shows supreme contempt for forms of State and government. In *Mein Kampf* he says:

'The question of the outward form which this State is to assume —as it were, its coronation—is not one of fundamental importance; it is decided purely by practical considerations. As soon as a nation has become conscious of the great problems of its existence, questions of external formalities will no longer lead to internal strife. . . . Organization is nothing but a necessary evil. At its best it is a means to an end; at its worst an end in itself.'[1]

Thus the method by which the community is to reach its decisions, the constitution of the organs whose function it is to make provision for common interests, and their mutual relationship—all this is a matter of minor importance, which will 'settle itself'; they are mere 'outward formalities'. The age-long conflict about the governing principles affecting forms of State and of government, about which so many contentions have raged and on which so much energy has been expended, has been a struggle about 'outward formalities'. How this conflict should be decided is not, it appears, one of the 'great problems of existence' which a nation must try to understand; the way in which its life and the lives of its citizens shall be ordered, its aims decided upon and their achievement sought, are 'minor matters'. Prof. Koellreutter appears to consider this final, for he quotes these views again in his book with approval. His short section on the 'Form and Structure of the *Führerstaat*' consists almost exclusively of quotations from this part of Hitler's argument.[2]

The scientific interest of National Socialist doctrine lies not so much in the way in which it solves problems of political theory as in the extent to which it succeeds in fogging the issues raised by those problems. And here again

[1] *Mein Kampf*, p. 380.

[2] Op. cit., p. 167.

the last word of wisdom is this: more power and more pugnacity. 'The final and closest tie between Nation and State is made evident in the Authoritarian Leader State by the awakening of a keen determination to defend oneself, and offer armed resistance (*ein lebendiges Wehrwillen*), which is made outwardly manifest by the armed forces, but also by the new political mode of life. In this sense, every citizen who takes an active share in the politics of the Leader State is "a political soldier".' As is apparent in the last phrase, an army on active service is Hitler's model for organizing the State. This is a fatal mistake because, as was pointed out in Chapter II (p. 36 *ante*), the structure and the vital needs of an army and a State differ fundamentally.

2. THE THREEFOLD DIVISION: MONARCHY, OLIGARCHY, DEMOCRACY

Another method of classification divides States into *monarchies, oligarchies, and democracies.* This classification is according to the number of persons entrusted with the task of promoting common interests, and invested with authority for that purpose. The task and authority may be conferred on a single individual (the Greek word *monos* means 'the only' and *archein* 'to rule'), on a limited number of individuals (the Greek *oligoi* means 'few'), or on the whole of the members of the nation (the Greek *demos* means 'people'). This threefold division is of long standing; Aristotle expounds it, but Herodotus had made it before him. It has been somewhat discredited by modern writers. The famous political theorist and statesman Guizot, who held office in the first half of the nineteenth century, considered the division unimportant, a mere formal, arithmetical arrangement which did violence to reality. Jellinek likewise dismisses it, saying that it tends to increase our

uncertainty rather than enlighten us.[1] I do not wholly concur with this view.

There is, I consider, some connexion between the form assumed by an organ, as regards the number of persons constituting it, and the manner in which it functions. It is self-evident that the smoothness with which an organ works is in inverse ratio to the number of people connected with it. Deliberations at a large meeting necessarily take more time than in the case of a small committee at which decisions can be reached in a less roundabout fashion; and a single individual can obviously make up his mind still more rapidly. As against this there is a far greater likelihood, when the decision is made by all the citizens or their representatives, of all points of view affected by the proposal being put forward and taken into consideration, and thus of exerting their due influence on the policy ultimately arrived at. It is also a matter of considerable importance that the decision and the responsibility for it are closely connected. When the people deliberate and decide as a whole, they are responsible as a whole for the consequences; when a small section of the people, 'the few' or 'the best'—*oligoi* or *aristoi*—make the decision, *they* are the persons responsible; when power to decide is vested in a single individual—the *princeps* or 'Leader'—responsibility falls on him. We have here a point of vital importance in relation to the line and manner of development which the life of the group is to follow.

This, I think, explains the importance attached to the threefold division by writers on political science, and its persistence in the history of thought.

The appearance of these different forms was treated as a problem by the thoughtful soon after the question of the

[1] *Allgemeine Staatslehre*, p. 665.

origin of the State and State authority in general had become the subject of philosophical inquiry. Aristotle perceived very clearly the dynamic element in organized authority. And the historian Polybius, who described the development of the Roman State which, owing to its phenomenal growth in power, made such a strong impression on the thinking minds of the period (Polybius was born in 208 B.C.), has given us a remarkable theory which would afford a complete explanation of the origin of the three forms. Polybius had favourable opportunities for observing and acquiring reliable material, and, being a man of remarkably keen intelligence, he used those opportunities to advantage. He was well schooled in Greek historical and political thought, and had had practical experience, as a statesman, of the turbulent Greek political life. He had come to Rome as a Greek hostage, and moved there in the cultured circles of the Scipios. He had, consequently, a close view of the situation and yet an outsider's view, being neutral himself and taking no part in Roman politics. This, in conjunction with his remarkable talents, makes his work specially valuable: As Mommsen says: 'His books are like the sun in the field of Roman history; at the point where they begin, the veil of mist . . . is raised, and at the point where they end a new and, if possible, still more vexatious twilight begins.'[1]

Polybius sets out to give an account of the origin and development of the Roman State, and also to explain it by reference to cause and effect. This project naturally leads him to express general opinions on matters of political theory. Here again he regards matters purely from the point of view of cause and effect. The same causes always produce the same effects. This applies to different forms of

[1] *History of Rome*, Book IV, ch. xiii.

states as it does to everything else. He analyses the process of the rise and fall of these forms of State psychologically, and establishes a *cycle*: one form succeeds another, always in the same order: monarchy, oligarchy, democracy, democracy being followed by monarchy.

His analysis of the material available, which was already fairly considerable, is very astute. Political organization, he says, begins with autocracy: in primitive conditions he who excels in courage and physical strength assumes leadership and government; people follow the most powerful warrior. When the mutual confidence of members of a group increases, kingship comes into being. Then, as long as the kings take proper precautions for the defence of important places, and extend their territory in the interests both of safety and of acquiring abundant supplies of food for their subjects, devoting all their efforts to those ends, they remain immune from envy and hatred. For, as regards the food they eat and the clothes they wear, there is little to distinguish them from any one else; they live like others and move among the people. But when their successors found all these precautionary measures already taken and supplies secured, or even discovered that they disposed of more than was necessary and consequently had little or nothing to trouble about, they then gave rein to their desires and took the view that kings should distinguish themselves from their subjects by differences in attire and the possession of a finer and richer table, and that there were no limits to the gratification of their sexual appetites. The one leads to envy and irritation, the other to hatred and bitter lust for revenge. In this way, Polybius argues, kingship became tyranny, and at the same time the seeds of destruction of royal rule are sown and the temptation to attack kings offered. These attacks are made, not by the lowliest but by the most high-

minded and bravest, for they are least able to brook the rulers' pride. And as the populace warmly supports the new leaders for the reasons mentioned, the complete abolition of the monarchical form of State follows and aristocratic government makes its appearance.

At first the new leaders give all their devotion to the common welfare, and all that they do, both for individuals and for the whole group, is performed with the utmost care and diligence. But when power of this kind is handed down from fathers to sons, the latter have never known human suffering and are completely ignorant of civil equality and liberty because they have been brought up, from their earliest youth, in the exalted atmosphere of privilege enjoyed by their fathers. In these circumstances abuses are met with similar to those which occurred in the case of the autocrat's descendants. Once more the populace experiences the feelings it had before, and once more a revolution is brought about. Aristocracy now gives way to democracy, for at this stage the people undertake care and responsibility for the general welfare themselves. As long as there are still some people left who have had experience of the arbitrary exercise of power, they feel satisfied with the new constitution and hold equality in esteem: liberty above all things is their watchword. But when new generations grow up and democratic government becomes the charge of the sons of sons, the latter, having been themselves accustomed to these good things, no longer prize equality, and they strive to exalt themselves above the populace; the more wealthy, in particular, make efforts to attain this end. They seek honours to which their own merits give them no title, and they resort to flattery. Democracy perishes when their foolish ambitions and demagogic methods have perverted it. Violence and jungle law take its place, and popular

the word, from an individual to a select group, from a group to the people as a whole. Authority is a function or complex set of functions, and, as has been pointed out, the function and the organ exercising it influence one another. The constitution of the organ affects the manner in which it functions; and conversely the function has requirements of its own which tend to affect the constitution of the organ. And secondly, it is impossible to hand over 'authority' as one hands over its external symbols—the crown and sceptre, the sword of State, the bundle of rods and the lictor's axe—the reason being that the complex set of functions finds its own objects undergoing modification and its own scope extending as time goes on, which process in turn alters the functions themselves.

The cycle hypothesis, the theory that 'history repeats itself' and that 'there is no new thing under the sun', is all too simple and too mechanical in its conception. History, including political history, never repeats itself, indeed never can repeat itself exactly. The principle of causation itself prevents this, for the very reason that the circumstances in which general causal rules are to operate are never exactly the same. The mere fact of the past, and the consciousness of that past, are enough to ensure that people never find themselves in exactly the same position as regards the facts, apart from the circumstance that the facts can never be exactly the same facts, though they may be similar in certain respects.

The hypothesis of a cyclical sequence of forms of State is certainly not sound as a general theory. But what is important in it is the conscious application of a purely causal explanation of phenomena, the consistent acceptance of the principle of causation. So when Kelsen contends, in his *Naturrechtslehre und Rechtspositivismus*, that it was not till the

beginning of the nineteenth century that political science showed signs of applying causation, this is very far from the truth. From the earliest days of methodical and ordered thought about the State, attempts have been made to explain its form and constitution by reference to cause and effect.

The shrewd analysis of the psychologies of the governors and the governed, occasioning repeated modification of the system of government, is also of importance. When the persons in authority are found wanting in the performance of their task, when members of the group begin to feel that the services rendered to the community are not commensurate with the special privileges and rights enjoyed by the governors, then the most important of the conditions precedent to a change in the form of State is present.

Authority and the right to command come into existence, as we have seen (p. 43 *ante*), when it becomes necessary to organize force and regulate human relationships. At times when life and the means of enjoying life are in peril, when rapid decision is essential, people are inclined to institute a single organ of government and endow it with considerable authority. But when that authority passes into the hands of unworthy persons, of men who do not understand their functions and who exercise them to the detriment and not to the advancement of the general welfare, then those who are subject to it feel that the situation is one of injustice and that it is their right and their duty to put an end to it. A movement to get rid of the man in power is started. If the fault appears to be a personal one or to be one of policy, the revolt will be directed against the particular ruler; if on the other hand it seems to lie in the *system*, its object will be the general régime in question.

The history of a people, it should be noted, is largely

determined by its national character, and particularly by whether or not it has a 'sense of continuity' and a 'sanguine' temperament (to adopt the old psychological classification). The possession of a 'sense of continuity' and the protracted subconscious operation of former states of consciousness will make a nation put up with a bad ruler so much the longer, owing to the enduring nature of the respect felt for his great predecessors and illustrious house, and the operation of habit, apathy, and tradition. And this result is further promoted by the entertaining of such religious beliefs as that the particular person or family was appointed to the office by divine choice. On the other hand, the 'sanguine' temperament will make a people more ready to act and more easily dissatisfied with a weak and inefficient government, and better disposed too to resist oppression or abuse of power. 'Sanguine' people whose reactions are prompt and intense and whose 'sense of continuity' is comparatively weak are in the nature of things more likely to enjoy an eventful and variegated political development than those whom a firm sense of tradition and apathy incline to a fatalistic attitude. Finally, 'sanguine' people with a strong 'sense of continuity' show a tendency to retain existing organs of government but to adapt them to new requirements; the case of constitutional monarchies is a striking example. Fortuitous circumstances can also affect the process of development. The comparative length of the series of energetic and able rulers belonging to the same dynasty, for example, may have far-reaching consequences.[1]

We see from this that the sequence of different forms of State is not such a simple, rule-of-thumb matter as Polybius would have us believe. His theory offers yet another case

[1] Cf. Freeman, *The Growth of the English Constitution*, 7th ed., London, 1894, p. 76 et seq.

of too hasty generalization, though Polybius himself had much useful material at his disposal. The truth is that the factors which determine the sequence are far more variegated and complex than he imagined.

Because of this greater complexity the well-known threefold division of forms of State has, in its pure form, ceased to apply to the higher stages of political development. The chief reason for this is that the several distinct functions of 'authority' discussed above make separate and specific demands on the organs which are to discharge them. At the higher stages of development, therefore, it is no longer possible, let alone desirable, for the various functions of 'authority' to be exercised by organs whose constitution is similar. It follows that it is no longer possible to make a clear-cut division by reference to the number of persons invested with 'authority'. The only possible distinction is between various 'mixed' forms which do, however, resemble the three 'pure' classes in varying degree, i.e. according to the constitution of the organ which has the last word.

Different functions make different demands. The legislative function of authority calls for the enactment of rules of conduct to guide the future behaviour of the community; rules which (when made) remain in force until they are repealed, and need not therefore be continually repeated, like the acts of the executive function. The execution of laws, on the other hand, is a day-to-day activity; it entails continually repeated action, calculated to promote the attainment of the objects contemplated by the standing rules of conduct. Justice, again, is regularized reaction against conduct which conflicts with these rules; it is the repeated readjustment of the balance when disturbed by such conduct.

It is obvious that the first-mentioned function demands an

extensive knowledge of the social life of the community, of the number of interests affected by an enactment, and of the needs and requirements of the community generally. Measures designed to remain in force for some time naturally require fewer decisions than executive acts and judicial decisions. The legislative function may therefore be efficiently exercised by a large assembly, but not the executive and judicial functions, once communal life has passed the primitive stage. This was demonstrated by the inefficient way in which organs of government functioned in such ultra-democratic Greek states as Athens. In large modern states a purely democratic form is no longer possible. Only mixed forms, modified democracies, are to be found.

3. TYPES OF MODERN DEMOCRACIES

Modern democracies may be subdivided into three classes, according to the relation between the organs of government which discharge the three different functions. The classification is as follows:

1. Representative popular government with a Parliamentary system;

2. Representative popular government with Separation of Powers;

3. Representative popular government subject to some direct popular influence (e.g. referendum, or popular initiative).

The representative system is common to these forms, but the part played by representation is not the same in each case.

In the first case the representative body and the executive are closely associated. The heads of the administrative departments, the Ministers, are, in accordance with the doctrine of ministerial responsibility, responsible to the

representative body for all executive acts. When this system works smoothly, the result is a Cabinet so constituted as to enjoy the confidence of the popular representative assembly, which can happen only when it governs in accordance with the political objects of the majority in that assembly. This system, which was developed in Great Britain in the course of the eighteenth and nineteenth centuries, has been adopted by a number of other countries, with slight modifications: France, the Scandinavian countries, Belgium, the Netherlands, the British Dominions, Czechoslovakia. The system differentiates between legislative and executive organs of government. The legislature consists mainly of a large assembly, the executive of a smaller body whose task it is to carry on the work of administration from day to day; this latter is further subdivided into smaller parts known as the departments of State. But in normal circumstances the task of administration is performed in accordance with principles subscribed to by the majority of the members of the popular representative assembly. Obviously, if this is not the case, the popular representative body may, by a majority vote, terminate the exercise of the executive function by this particular ruler or combination of rulers. The making of law and the laying down of the general lines of administration under this system are, therefore, the work of people appointed by the whole of the citizens, whose title to office depends on their being returned at elections which occur periodically.

Those organs of government which are to exercise judicial functions are, however, made independent of the other organs as a matter of principle; the reason being that the proper exercise of this specific function demands the utmost impartiality and complete independence.

Under the second of our three systems, the executive

is made independent of the representative body as a matter of principle. The executive has its own title to rule, in the shape of popular election. The executive organ, the President, appoints his own collaborators, the heads of the various administrative departments, and these are not responsible to the popular representative body, but to the President himself. The representative body cannot, therefore, by its majority vote prevent any minister or set of ministers from taking part in the executive work. As will be seen, it is only in so far as the constituents who elected the representative body and those who elected the President were guided by the same principles that there is a possibility of the same views prevailing in the exercise of both legislative and executive functions. When the two elections synchronize this will of course be the case. As for the judicial function, it is exercised by organs which as a matter of principle are made as much independent of the others as is possible, the method adopted being either appointment for life (or 'during good behaviour'), or a separate popular vote.

This system puts into practice the doctrine of the Separation of Powers. It obtains in the U.S.A. and in states whose constitutions were modelled on that of the U.S.A. The 'Fathers of the Constitution' were strongly influenced in their views by the doctrines of the highly esteemed Montesquieu, who saw in this triad the safeguards of political liberty and security of life and property.[1] It is, indeed, strange that Montesquieu thought that this was the system of the British Constitution. To be quite fair, he thought it was rather the idea and intention of that Constitution; he explicitly mentions the possibility that the position might in fact have developed differently: 'It is not for me to inquire whether the English really enjoy the liberty I speak

[1] See p. 53 *ante*.

of. It is sufficient that such liberty is established by their laws; I do not pursue the question further.'

The early history of the American colonies, incidentally, gave the colonists a natural bias in favour of this system. In the colonial period legislative and executive power were separate in the sense that the Governors, who were heads of the executive, were responsible not to the colonial representative assemblies but to the Crown.

The third of the three systems puts the legislature under the direct control of the electorate. Control may vary in degree, in that the referendum may be compulsory or optional. When you have a compulsory referendum the validity of legislation is dependent on the consent of the citizens themselves, expressed by a majority of votes; bills *must* be put to the popular vote. This system obtains, as regards enactments affecting the constitution, in the Swiss Federation.[1]

The expression 'optional referendum' describes the state of affairs obtaining when a bill passed by the legislature must be put to the popular vote if this be demanded by a specified number of the electorate within a specified period. In the Swiss Federation this applies to ordinary measures.[2]

All these forms may be said to be types of modern democracy (in the modified sense mentioned), for in the last resort the final decision rests with the people, the organized community of citizens. Nevertheless, the *modus operandi*, according to which these types function, shows important differences in the different cases. The difficulty lies in the achievement of similarity of purpose in the legislature and the executive.

[1] See Art. 123 of the Swiss Federal Constitution.

[2] Ibid., Art. 189 (2).

In democracies governed by the Parliamentary system similarity of purpose between executive and legislative organs of government is, in principle, easily achieved. Should the administration depart from the political aims subscribed to by the popular representative assembly, the latter can at once by its vote turn the offending Government out, and effect its replacement by a Cabinet holding the same political views as those which prevail in the representative assembly.

In the case of the second kind of democracy, the American variety, this cannot be done. The head of the executive, the President, cannot be removed during his term of office because he pursues a different policy from that favoured by members of the legislature; only in the case of serious offences may he be 'impeached'.[1] The popular assembly draws up the impeachment for trial by the Senate;[2] conviction results in removal from, and, disqualification for, office.[3] It is therefore possible for different policies to be pursued by legislature and executive. And this is not a mere *theoretical* possibility; for the elections for the representative body and those for the presidency are held at different times, and an intervening change of political opinion on the part of the electorate may bring about discrepancy. President Woodrow Wilson, one of the founders and chief advocates of the League of Nations, met with so much opposition at the hands of a politically hostile Congress that the idea of the U.S.A. joining the League had to be abandoned. Woodrow Wilson's position was itself a tragic

[1] Art. II, s. 4 of the U.S.A. Constitution: 'The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours.'

[2] Art. I, s. 5. 2 (5) and 3 (6).

[3] Art. I, s. 3 (7).

example of what he had written as the author of his most successful book:

'Moreover, it is impossible to deny that this division of authority and concealment of responsibility are calculated to subject the government to a very distressing paralysis in moments of emergency. There are few, if any, important steps that can be taken by any one branch of the government without the consent or co-operation of some other branch. Congress must act through the President and his Cabinet; the President and his Cabinet must wait upon the will of Congress. There is no one supreme, ultimate head—whether magistrate or representative body—which can decide at once and with conclusive authority what shall be done at those times when some decision there must be, and that immediately. Of course this lack is of a sort to be felt at all times, in seasons of tranquil rounds of business as well as at moments of sharp crisis; but in times of sudden exigency it might prove fatal—fatal either in breaking down the system or failing to meet the emergency.'[1]

Montesquieu was indeed aware of this disadvantage of the threefold system, but disposed of the difficulty with a vague generality: 'Ces trois puissances devaient former un repos ou une inaction,' he writes.[2] 'Mais comme, par le mouvement nécessaire des choses, elles sont contraintes d'aller, elles seront forcées d'aller en concert.' But it is not so simple as all that. It is true that 'le mouvement nécessaire des choses' will do much to conduce to agreement, and when a nation has plenty of common sense and its members are ready to recognize each other's rights and interests a solution will generally be found. 'Sensible shareholders, I have heard a shrewd attorney say, can work any deed of settlement; and so the men of Massachusetts could, I believe, work any constitution,' wrote Bagehot.[3] But that solution

[1] *Congressional Government, A Study in American Politics*, p. 283 of the 15th ed.

[2] At the end of Book XI, ch. 6.

[3] Bagehot, *The English Constitution*, p. 238 of the 2nd ed., 1872.

will often bear the marks of a compromise, with all the attendant disadvantages, and will, moreover, usually have been attained with great difficulty, and often too late. The system works in spasmodic fashion and is less flexible than the Parliamentary form of government, for which Wilson entertained a sneaking preference.

Under the third of the three systems agreement in matters of policy is attained, and this is due to the fact that the executive, which in the case of Switzerland has a corporate character—the *Bundesrat*—accepts the decisions of the representative body, i.e. of the electorate, without demur, and acts accordingly. The members of the *Bundesrat* are elected by the *Bundesversammlung* at a joint meeting of both Houses. Once elected, they are, according to constitutional usage, no longer dependent on the supporting votes of the representative body. They remain in office even when the *Bundesversammlung* makes a decision of which they do not approve, or if the electorate rejects a bill by referendum. There is no opportunity for expressing lack of confidence in a member of the executive until the end of his three years' term of office. In the Parliamentary history of the Swiss Federation it has, however, rarely happened that a member of the *Bundesrat* has failed, for political reasons, to secure re-election.

The reason for these differences in the forms of modern democratic organization is to be found in the political histories of the states concerned. The Parliamentary system is a suitable adaptation of the monarchic form of State, as affected by the application of the principle of ministerial responsibility. The function of the monarch has changed its character without any alteration of its external form. It has become that of stabilizing and ensuring the smooth working of the system, by making it certain, as a

non-party organ, that government will be entrusted to the party or group of parties which has secured a majority. This function is of great importance; on its proper discharge depends the continued unimpaired existence of the whole constitutional system. It demands a comprehensive knowledge of political relationships and public opinion, insight, and—not the least exacting of the requirements—self-denial, for the reason that the strictest impartiality is necessary in assessing the demands of different sections. Further, the function is a stabilizing one because Ministers are thereby constrained to justify their actions to an organ of government which, by virtue of position, education, and tradition, usually enjoys considerable authority.

In America the revolt against the existing system and the hatred excited against King George III's Government made a monarchic system a political impossibility, though Hamilton, a shrewd statesman, cherished a strong preference for the British system. 'Freedom' was the cry; freedom was praised in soul-stirring language and, on the lines laid down by Montesquieu, a system of 'checks and balances', calculated to make the abuse of power by its separate holders impossible, was instituted. This, it was thought, would mean government by law, by unbiased legislation, and not by weak, fallible men. Another factor was the earlier constitutional history of the colonies, to which reference has already been made (p. 103 *ante*).

Switzerland was ripe for its particular system because of the large part which its people had already played in public affairs in various parts of the country. The institution of a deliberative assembly of electors competent to make decisions had been preserved in most of the little *Länder*; at meetings of the *Landesgemeinde* every free citizen took a direct part (and in some small cantons they still take part)

in the conduct of public affairs. Increase of population and the ever-growing complexity of legislation and administration make it nowadays inherently impossible for citizens to attend such an assembly, deliberate and decide, and the institution of the referendum is as close an approximation to the old universal participation as changed circumstances will permit. To quote a Swiss authority, 'In Switzerland democracy in its purest form first appeared in the nineteenth century as a result of the fusion of the ancient Germanic ideas prevalent in the German-speaking districts (which contributed the *Landesgemeinde*) and the theory of the 'citoyen de Genève', Jean Jacques Rousseau'.[1]

The disadvantages of the referendum are fairly obvious. The greatly increased complexity of legislation and administration in almost every department of public welfare demands a far higher degree of expert knowledge, insight into social relations, and study in order to be able to judge of the fairness of concrete proposals than the average citizen commands. 'I rather feel', said an opponent of the institution in the Swiss legislative assembly, 'that the groom equipped with a copy of the Commercial Code and the cowherd armed with the Code of Civil Procedure, in order to fit themselves for the exercise of their sovereign rights, make a bit of a caricature.' The answer to this is that most members of representative bodies, if equipped with such legal works, would hardly know what to do with them. The truth of the matter is that, while the organization of society has become far more complex than it was, the change has been attended by a measure of particularization: partly among the organs of government themselves, partly in their actual mode of operation. Particularization among the organs themselves is demonstrated by the increasing use of

[1] Fritz Fleiner, *Schweizerisches Bundesstaatrecht*, Tübingen, 1923, p. 17.

the device of delegating authority, now common. In the mode of their operation it is exemplified by the extent to which the actual draftmanship of measures is entrusted to experts in the representative assembly and in party organizations. There is no need for the notorious groom and cowherd to rack their brains about the Commercial Code and Code of Civil Procedure, for such matters are not usually put to the popular vote by virtue of the optional referendum.[1] In the same way, in representative assemblies themselves members who are laymen in such matters usually follow the lead of experts who enjoy their confidence. And the referendum has its advantages. One is that through it a decision may be reached about matters in dispute over the heads of Parliamentary parties and their organizations. This has an important effect on the way in which proposals are approached. Members of the popular representative assembly may feel themselves less constrained by considerations of party allegiance when called upon to vote if, in the last resort, the electorate will itself decide the fate of the measure, and the question whether the Government will remain in or resign office does not depend upon their votes. Again, the electors when returning members to Parliament may in these circumstances give more consideration to the personal merits of the candidates, to their intellectual qualities and characters, and pay less attention to party politics. This makes party strife less bitter.

But the system is workable only as long as there are no sharp differences of opinion on questions of practical politics. It is difficult to imagine how, in the event of a conflict of opinion as to the scope and significance of the royal prerogative and the authority of Parliament, a member

[1] The Swiss Civil Code of 16th December 1907, an excellent piece of work, was passed without any referendum.

who subscribed to conservative principles could remain in office and give effect to the decisions of a pro-democrat Parliament. It is readily understood that the problem of the limits of cantonal autonomy, the question of private or public ownership of railways, &c., do not touch the conscience of a politician to such an extent that he would consider it an impossible task, and one which he should not in reason be called upon to perform, to continue his executive functions after one of his proposals has failed to secure the approval of the majority in the representative assembly or of the electorate at large.

Each of the different types of modern democracy has its advantages and disadvantages. The Swiss system makes for continuity in the composition of the executive and consequently for long training, practice, and practical experience on the part of members of the Government, which is all to the good. On the other hand, it produces a greater likelihood of mere routine work, apathy, and closing of the mind to new methods and ideas; which, however, may be preferable to what happens in a system under which the tenure of an office of State is frequently changed, with the result that time is lost while the new holder makes himself acquainted with his work and permanent civil servants acquire more authority than is desirable.

The American system has the disadvantage of relying too much on compromises; 'checks and balances' may prevent any of the organs of government from acquiring too much power, but they do impede decision. Too much in the way of negotiation and give-and-take is often necessary, with the result that no clear-cut, consistent policy can be embarked upon. In times of emergency and crisis the political flair and the practical business sense of the American people help them get over the more serious diffi-

culties,[1] but for everyday affairs the system is difficult to operate.

The Parliamentary system pure and simple has the advantage that the executive and the representative body work hand in hand. To offset this there is the fact that the Government is constantly liable to be turned out of office by an adverse vote. Under both the American and Swiss systems the Government is elected for a fixed period and is assured of holding office for that period. In countries governed by the Parliamentary system there is, as a matter of principle, no such security of tenure. When the political situation is itself more inclined to be stable than otherwise, as in Great Britain and the Netherlands, the disadvantage is not overwhelming. In these countries a Cabinet is unlikely to be defeated in between two general elections. In France, on the other hand, the objection is indeed a serious one; a French Cabinet has a very uncertain and often a brief existence. Slight differences as to administration, comparatively trivial and superficial changes in public opinion, or unfortunate incidents, may mean the dismissal of a particular Cabinet by means of an adverse vote. In the Third Republic there have been 100 Cabinets in less than seventy years.

The reasons for this difference are partly to be found in a particular feature of the several constitutions. The British and Dutch constitutions provide for dissolution of Parliament at the instance of the executive. When there is a threat of conflict between the Government and Parliament the sword of Damocles, in the shape of a threat of dissolu-

[1] A note to the passage cited on p. 105 *ante* from Woodrow Wilson's *Congressional Government* runs: 'These "ifs" are abundantly supported by the executive acts of the war-time. The constitution had then to stand aside that President Lincoln might be as prompt as the seeming necessities of the time.'

tion, is held above the heads of the representative assembly, which tends to make it think twice. In France the written Constitution contains a similar provision—the President can dissolve the chamber with the approval of the Senate.[1] But the stipulation that the Senate shall agree is in itself a check on its use, since the probability that the Senate will agree with the views of the majority in the Chamber of Deputies is indeed high. And apart from this, this right to dissolve Parliament has fallen into disuse since an unfortunate experience, which occurred under President MacMahon, and to all intents and purposes the deterrent no longer exists.

The difference can also be explained by, and in my opinion, is due in greater measure to, differences in national characters. In Great Britain and the Netherlands party relations are more stable, because the average Briton and the average Dutchman cling more tenaciously to party ties and loyalties, when once formed and adopted; 'sense of continuity' is stronger, emotional excitability less. Englishmen and Dutchmen approximate, in other words, to the psychological 'phlegmatic' type, while the French character favours the 'sanguine' type with all its attendant advantages and disadvantages. Party splits, and the re-grouping and re-alinement of those parties on which the government relies for support, occur far less frequently in the course of the life of a Parliament in the first two countries than in France; indeed they happen but rarely. The average life of a Cabinet is consequently substantially longer and this materially promotes stability in administration, experience, and the efficient discharge of their duties by Ministers.

[1] Art. 5 law of Feb. 25th, 1875, concerning the organization of public powers: 'The President of the Republic, conforming to the opinion of the Senate, may dissolve the chamber of Deputies before its legal term of office has elapsed.'

On the other hand we must be careful not to exaggerate the disadvantages of the French system. Cabinets change rapidly in France; their personnel is far more constant. Poincaré, Briand, Herriot, Painlevé, and several other politicians have taken part in the government of their country, in the course of their political careers, just as long as, if not longer than, some British and Dutch politicians; only, they have done so as members of combinations more liable to change. Their administrative practice and experience is, however, no less extensive, and the net result is that there is, in French politics, a far greater measure of stability than the rapid changes of Cabinet at first sight suggest. Stability is also promoted by the availability of an efficiently organized Civil Service, with ample experience and a long tradition behind it.

The efficient functioning of the Parliamentary system is, however, liable to be endangered and hampered when parties subdivide. Identity of political objects on the parts of the executive and the representative assembly respectively is most easily attained when there are only two parties, with distinct policies, and the result of the election has shown which of them has the majority of the electorate behind it. But this is a state of affairs which has often not been attained, even in the country in which the two-party system originated, Great Britain. It came to an end there long ago, when the Irish Nationalist group made its appearance beside the Conservative and Liberal parties, and later on the rise of the Labour Party dealt it a further blow. Even before then, dissent within a party was not an uncommon occurrence; as witness the secession of Peel's supporters, the 'Peelites' (Gladstone among them) from the Tory Party, and the secession of the Unionists (including Joseph Chamberlain) from the Liberal Party. The formation

of a Cabinet has often been a difficult task in Great Britain, and not by any means the simple matter suggested by the apparent facts of the situation.

In other countries, especially in the Netherlands, this process of subdivision into small parties has been carried much further, the reason being that religious differences have played a part. This has caused an unusual amount of difficulty in the formation of Cabinets; in the Netherlands the solution of a Cabinet crisis usually takes weeks, and was, on one occasion, a matter of months. In consequence, the relation between Parliament and the Government has become vague and indefinite. Efforts to find a common basis on which various Parliamentary factions would declare themselves prepared to support a ministry having failed, the formation of what was called 'extra-parliamentary' cabinets was resorted to. This did not mean, as the expression would suggest, a departure from the Parliamentary system and a return to the system of so-called 'royal' cabinets (cf. 'The King's Friends'), based on the confidence of the monarch instead of on that of the representative body. Far from it; none of the so-called 'extra-parliamentary Cabinets' remained in office after sustaining a defeat in the Chamber by appealing to the confidence of the Crown. The significance of the expression 'extra-parliamentary' in this connexion is to be found in the method of formation; all that is meant is that Parliamentary parties are left out of account when it is composed. The consequence has been a confusion of responsibilities; parties whose leaders had joined these Cabinets, and which had always supported the ministries they represented—which, in other words, had acted as Government, not Opposition parties—declined responsibility on the ground that the Cabinet was 'extra-parliamentary'. Such behaviour inevitably confuses political

life, puts the ministries concerned on an unsound foundation, and makes a strong, definite policy impossible. Compromises have to be sought; problems which are in fact urgent, but the discussion of which would lead to friction between some of the groups co-operating, have to be shelved; and government has, as it were, to be carried on from day to day.

Under the American and Swiss systems the formation of an executive has to be completed at a particular time and within a prescribed period by a majority decision at an election; it follows automatically that the ministry has a majority of the people behind it. Under the parliamentary system there is nothing to limit the period or prescribe the method of giving effect to the majority decision when the executive is constituted, and sometimes this absence of restraint is exploited without due consideration being given to the more remote possible consequences.

It is now clear that there are different methods by which modern democracies may seek to give effect to the people's will in the matter of legislation and administration. Each of these methods has characteristics peculiar to itself, each has advantages and disadvantages; a system free from defects and drawbacks has yet to be discovered.

A point which should be noticed is that each of these methods uses the party system. A democratic system which knows no parties is, indeed, unthinkable. Regular decision by a large group of people not assembled together is possible only when the group is divided by reference to political objects. When no such division has been effected, no decision can be made by the members of the group; a decision can be made over their heads only, by some individual, or a number of individuals: in other words, monarchy and oligarchy are the alternatives to party government in a democracy. If the members of the community are not to be

treated as a collection of objects, as so much material to be handled, if they are not to be looked at as creatures without wills or instruments in the hands of a ruler or group of rulers with the right to say, 'Thus *shall* ye act', the forming of parties cannot be avoided. The statement 'this is what we think, this must be done' cannot be repeatedly made by an unorganized group; there will always be difference of opinion; and if the making of decisions is to be ordered, a certain amount of organization is essential. The reduction of ideas which are divergent and often vague and fluctuating to a more conscious 'public opinion', which will make ordered decision possible, is the function of political parties.

The formation of parties is therefore indispensable to popular government, and is bound to be a feature of any democratic State; but the *principium divisionis* need not be, and indeed is not, the same in every case. The Scottish philosopher Hume, a man with an astute analytical mind, saw that there might be three possible bases for the formation of a party: principles, interest, and affection (for a particular leader or family[1]). He considers the most practical basis, or at all events the least inconvenient (for in his Essay he apparently fails to appreciate the inevitability of parties), that of interest. A common interest or set of interests, that is to say the sharing of interest in one or more circumstances important to life, does indeed constitute a factor which tends strongly to unite people into a group.[2] But under modern conditions, a party based on common interest is normally unpractical in the long run; and when regard is had to the essential function of a party it is seen to be unworkable. For the modern State has such a variety of tasks to perform that the sharing of interests in one particular

[1] *Of parties in general*, Essays, I, p. 56, in the 1793 edition.
[2] See p. 37, *ante*.

sphere of its activity does not necessarily entail common interest in another sphere. Attempts to apply the interest test nowadays usually fail; a party based on common interest on the part of its members obstructs the work of organizing public opinion, hampers ordered decision by the group, and makes for its being dominated by a small clique.

A later Essay, which is devoted to the study of political parties in England in particular, shows, incidentally, that Hume was aware that even in his time (the eighteenth century) interest was not the real basis of party differences in Great Britain. In this essay he points out that some people entertain a certain distrust of liberty and a strong feeling in favour of the inviolability of existing authority, while others, on the contrary, have a greater faith in the use of liberty by human beings; they take a more favourable view of human endeavours, and are less inclined to consider the existing system as something inviolable and immutable. He regards this as the basis, in the last resort, of the division into Tories and Whigs, 'Court' and 'Country'. This division is assuredly a matter of principle. The same explanation applies to the old American division into 'Federalists' and 'Democratic Republicans'. The first great leaders of those parties, Hamilton and Jefferson, personified the two types fairly accurately: Hamilton was the advocate of a strong central government, and agreed to the decentralized State organization only as a compromise necessary in the circumstances; Jefferson, by way of contrast, would have no serious objection to a minor revolution once a generation.[1] Gladstone, again, described the basis of the division when he observed, in the course of a conversation with Morley: 'I think I can truly put up all the change that has come into

[1] Cf. Prof. Andrew C. McLaughlin, *A Constitutional History of the United States*, New York and London, 1935, p. 241 et seq.

my politics into a sentence; I was brought up to distrust and dislike liberty, I learned to believe in it.' When the process was complete, the ardent Tory had become a Liberal.[1]

Despite this it must be borne in mind that Hume's analysis gives us a scheme of things, while in actual political life party differences are always very complicated. If we make the division according to principle we must remember that the choice of a party in actual life always entails some sacrifice of interest, to a greater or smaller degree, on the part of members concerned; and again that affection for a particular person, be it an eminent statesman or a particular dynasty (Habsburg, Stuart, Bourbon, Orange, &c.) has often partly or wholly determined the choice of party, at all events when the nature and scope of the royal prerogative was still an issue.

However, the simple method of division of political supporters into 'authoritarians' and 'libertarians', conservatives and progressives, no longer meets the requirements of the case: in most states the principles of division have become far more complex. Various reasons may be assigned. First, in most Western states the constitution has developed into a fairly generally accepted system, which every one adopts as a basis. Philosophically and in jurisprudence there may still be a good deal of divergence of opinion as to the foundation of 'authority' in the abstract, but for practical purposes conflict about the institution itself has now ceased. The different systems of self-government discussed above constitute the universally recognized framework for party conflict, and are no longer themselves the matter at issue. And secondly, social and economic conditions are far more complex than they used to be, and this makes it more difficult to judge of the desirability or otherwise of proposed legislation.

[1] Morley, *Life of William Ewart Gladstone*, Part III, p. 474.

For these two reasons it has become much more difficult for the ordinary citizen to formulate his political objects than it was when the existing systems were still being developed. The question whether the monarch, a group of affluent people, or the whole of the citizens, regardless of wealth, shall have the last word in deciding matters affecting the future of the nation is a simple one, in itself easily understood by the average citizen. But the question how the power to govern is to be used raises problems which are far more complex. To what extent is the State in its function of organizer to interfere in the private lives and activities of individuals, in their economic, cultural, and spiritual activities? This raises questions of quite a different nature, and means differentiating between the consciousness of citizens as regards these different spheres of activity. Here again we may find ourselves up against apparently clear-cut ideas and come across slogans which purport to simplify the issue: we shall be presented with the antitheses of society and the individual, mass production and the 'little man', socialism and individualism. But these simple notions do not meet the requirements of the variegated life of to-day. Human nature is such that the temptation to see things as being as simple as possible is always present. Both emotional thinkers 'qui pensent en grands blocs' and people who favour an easy life fall victims to it; the former because they are consumed with impatience and are full of emotional ideas, the latter because they will not face the effort and exertion involved in thinking and in carefully collecting and comparing data, or because they have no opportunity for such work. The idea that the clear-cut contrast between the 'Haves' and the 'Have-nots', the *bourgeoisie* and the proletariat, completely dominates all politics and decisively determines the line of cleavage between parties, is confuted

by the actual facts. The function of organization operates in so many different spheres of activity that what might be called the 'means test', however important property may be, has been shown not to be the decisive factor in the division into parties in modern states.

The process of differentiation has been carried further in some states than in others. In Great Britain there are, since the settlement of the Irish question, three parties: the Conservative, Liberal, and Labour Parties. The basis is still to some extent that laid down by Hume and mentioned above: 'The essence of conservatism is to be discovered in the social institutions of which it approves and its attitude towards the idea of Progress', says Finer.[1] 'The social institutions favoured by Conservatives are crown and national unity, church, a powerful governing class, and the freedom of private property from state interference. Each of these is desired both for itself, as an end, and also as a means to something else.' This clearly implies acceptance of the existing system, as it obtains to-day; i.e. looks on the present legal and state-established order of things as inviolate.

Of the Liberal Party, Finer says[2]:

'The Liberal creed is more an amalgam than the Conservative, and this is easily comprehensible, for the party of conservatism and defence is not, like the party of attack, compelled to seek new weapons and justification, while the very essence of Liberalism is openness to new experience and the vindication of free growth. It began in the religious struggles of the Reformation when the right of individual judgement and testimony in matters of faith was asserted, and developed soon into an assault upon the notions of a State church and arbitrary government. These have remained fundamental propositions in the latest history of the party, its new

[1] Herman Finer, *The Theory and Practice of Modern Government*, vol. i, p. 516, London, 1932.

[2] Ibid., p. 523.

and radical elements of the nineteenth century supporting them from character and interest.

'The individual is prior in importance to the State. Only in the individual appear the principle of growth, of initiative, of creation and the possibility of really assenting to its validity in other people. The ultimate goal of existence is to produce the greatest number of perfect individuals.'

Here again we distinctly recognize Hume's criterion, which we discussed above.

Finer regards the objects of the Labour Party[1] as

'the fusion of two tendencies: the Radical tendency entering from the Liberal Party (the fundamentals of democratic government) and the Socialist tendency. It would not be, at this moment, too misleading to say that the tenets of the Labour Party consist of sincere Liberalism, with the addition of communal safeguards against the waste and miseries incidental to *laissez-faire* in the economic sphere.'

This intervention of regulative power to abolish flagrant social injustice is itself based on democracy, which is approved of by the Labour Party and which it is anxious to preserve.

'Parties seize upon broad and vital truths first, and acknowledge the modification later; and the question of economic inequality was the most powerful upon which to build a party, precisely because its truth hardly needed demonstration to great masses of men, women and children who dwelt in a society, the livelihood of which was made by that combination of machinery, factories and management by private property-owners, called the Capitalist System. That system must be abolished, for while it exists there can be no real equality, no real self-determination, no culture free from distortion, no collectively-determined creation of anything valuable.'[2]

In the Netherlands, religious and denominational con-

[1] Ibid., p. 533.

[2] Ibid., p. 530.

siderations have to a considerable extent affected the structure of the party system. The Roman Catholic Political Party, which is the largest single party, deliberately and consciously makes religion the basis of political division. Other parties in fact consist of adherents of different Protestant churches. The result is a cross division, for progressives are to be found in the ranks of the so-called 'conservative' parties. This has given rise to difficult problems. Different sections of a party might agree about equal rights in the matter of education but fall out on some question of finance, defence, or colonial administration. Delays have been frequent, and compromise freely resorted to. Also, since Proportional Representation was introduced, the number of small parties has increased: there are fourteen parties in a Chamber of 100 members, including six one-man parties.

These circumstances give rise to reflection. Groups, which would be called 'wings' of a party in other countries, have become separate parties in the Netherlands. Now the formation of a party, like that of any other organized group of people, necessarily entails a certain aloofness from other people and a measure of exclusiveness; and in the case of a political party this may mean a certain hostility. We see this if we remember that a political party is formed for the sake of power, and is out for power, its object being to influence legislation and administration as much as possible and to make it conform with the party's aims. Power is largely a matter of numbers and membership has to be increased by persuading others to join and dissuading present members from leaving the party; and this involves conflict with other parties. Hence party differences tend to be exaggerated, the objects, methods, and conduct of opponents are severely criticized and the spirit of combativeness encouraged.

The language of political strife is borrowed largely from military terminology.

It is obvious that groups so opposed will not easily agree to co-operate, and as a consequence it is often very difficult to obtain a 'working majority' and a majority Cabinet. Compromise, as colourless as possible, has to be resorted to. Eminent leaders who have taken a prominent part in party warfare are less fit for office, and thus find themselves in a difficult position, unable to carry out, as ministers, the policies they supported and fought for in party politics. And the average 'expert' is not an expert in practical politics and applies simple tests when dealing with political matters; he then misjudges the situation or else forms no judgement at all but decides, with a feeling of disappointment, that he 'just can't be bothered' with politics, there being something dishonest and ignoble about them.

In the Netherlands the situation has often been saved by the temperate and sober nature of the national character, while the part played in politics by spiritual considerations has contributed to the process.

In France the division into small parties takes a different form. There is more fluctuation and change and party organization is less rigid. The method of division and even the names of the parties are always changing, almost from one election to another; nor do the same names mean the same thing all over the country. Since the decline of the monarchist parties all, except perhaps the Communist Party, subscribe to the existing constitution. They may be arranged in the form of a scale, conservatives at one end and ultra-radical reformers at the other. The names of the various groups do not express their actual characters; they all avoid the label 'conservative' and show preference for democratic and progressive-sounding names. In

Barthélemy & Duez's *Handbook* some ten groups are distinguished for 1924; from right to left they read: (1) The 'Union républicaine démocratique' (104 members); (2) The 'Démocrates' (14 members); (3) The 'Républicains de gauche' (38 members); (4) The 'Gauche Républicaine démocratique' (43 members); (5) The 'Gauche Radicale' (40 members); (6) The 'Groupe radical et radical-socialiste' (139 members); (7) The 'Groupe républicain socialiste et socialiste français'; (8) The 'Groupe du parti socialiste'; (9) The 'Groupe communiste'; and (10) some thirty members not belonging to any group.[1] For 1930 Finer distinguishes, on the authority of Privat, 14 groups: (1) 'Démocrates populaires' (18 members); (2) 'Union républicaine démocratique' (85 members); (3) 'Action démocratique et sociale' (31 members); (4) 'Républicains de gauche' (64 members); (5) 'Gauche sociale et radicale' (17 members); (6) 'Gauche radicale' (51 members); (7) 'Indépendants de gauche' (22 members); (8) 'Républicains socialistes' (15 members); (9) 'Radicaux et radical-socialistes' (113 members); (10) 'Parti socialiste français' (14 members); (11) 'Socialistes' (107 members); (12) 'Communistes' (9 members); (13) 'Indépendants' (41 members); and (14) twenty unclassified members. He draws the line of demarcation between 'right' and 'left' across the 'Gauche radicale' group.[2]

It is apparent from this that the division and names of parties for the two years taken do not correspond, though the more important groups occur in both series. Even in the course of a Parliament there may be realinement and regrouping.

This flexibility of party relations does much to explain the instability of Cabinets in France which we have discussed, but

[1] Joseph Barthélemy et Paul Duez, *Traité élémentaire de droit constitutionnel*, Paris, 1926, p. 445.

[2] Finer, op. cit., p. 602.

as party differences are not, as they are in the Netherlands, based on heterogeneity of *principia divisionis*, it is far easier to form a new French Cabinet. When one falls it is, as a rule, not difficult to constitute another of a slightly different political shade, relying on the support of other groups.

Nevertheless, division into a number of small parties has some unfortunate consequences and entails in France a loss of Parliamentary prestige; a certain scepticism as regards politics ensues, and there is a growing inclination to have nothing to do with them. Some extremely awkward cases of political corruption have made matters more serious (some time ago there was the Panama scandal; more recently the Oustric and Stavisky *affaires*). But it has not yet led to anything like a strong movement to abolish the existing system. Even those who realize the disadvantages of the present arrangement consider that the corresponding advantages tip the balance against an oligarchic system. As Prof. Gaston Jèze put it in an article in which he subjected the present system to severe criticism: 'With all its faults, democracy seems to me to represent a remarkable advance on all the other forms of government to which France has been subject through the ages.'[1]

But in some other countries the unsatisfactory way in which it worked entailed so many disadvantages that the system itself collapsed beneath them, and a new form of autocracy took its place.

4. MODERN AUTOCRACIES: THE SINGLE PARTY STATE

It is a remarkable fact that modern types of autocratic government have not formally abolished popular representative assemblies, but have preserved them in form,

[1] Jèze, 'Le dogme de la volonté générale', in the *Revue du Droit Public et de la Science Politique*, 1927, p. 171.

though their existence is shadowy and their functions are insignificant.

The aim of the Fascist political system in this respect is to give the representative body what is called 'corporate' character. Universal franchise, so runs the argument, on which modern representative bodies are usually based, is too 'atomistic'. It is not the individual citizen who should be represented, since the State is not a mere aggregation of individual citizens considered as so many atoms. The State is an *organic* structure consisting of a number of social organisms, and it is these organisms which should be represented.

In accordance with this view the Fascist electoral law, promulgated by Royal Decree on the 2nd December 1928, confers the right of making preliminary nominations for the popular representative body on the national federations of legally recognized trade unions. The Fascist character of these trade unions had already been ensured. Trade union leaders must, by virtue of the law concerning the collective interests of Labour and the Royal Decree of the 1st July 1926 based thereon, give assurance of competence, morality, and 'sound patriotic convictions'. But the next step is to submit the proposed candidates to the Fascist Grand Council, i.e. to the central office of the Fascist *Party*. It is the party organ that makes up the final list of candidates; and in so doing it may select names not only from the list submitted, but also from outside: it may choose people enjoying high reputations in the world of science, in art, literature, politics, or the army. Thus the executive of the party has the final say in constituting the list of candidates; it can see that only party members who are fully trusted appear therein.

Constituencies vote for or against the approved list *en bloc*. There is no alternative to the list, so actually there is

no choice. The power of the representative assembly under the Fascist system is, moreover, limited. The relation between executive and legislative power is different from what it is under the modern democratic constitutions discussed above. The Italian Minister of Justice, Alfredo Rocco, speaking in favour of the law of the 31st January 1926 which settled the relationship between executive and legislature, expressed himself as follows:

'A dominant position is accorded to the executive; the *Government* is the representative of the whole of the power of the State and exercises a *general* function. The other two powers discharge a *special* function and occupy a *secondary* position. The judicial and legislative powers are the result of the State having different functions. The executive power possesses and is the organ of all functions of State, taken generally. In other words, the legislative and judicial powers are *limited* and *specific*; the executive power, on the contrary, exercises unlimited and general functions.'[1]

The law of the 31st January 1926 concerning the relation between executive and legislative power speaks as follows about the right of the executive to enact measures of a legislative character (Art. 3):

'Measures having the force of law may be promulgated by Royal Decree, after consultation with the Cabinet (1) when the Government is so authorized by law, within the scope of such delegated authority; (2) in extraordinary cases, when emergency and absolute necessity so demand. The question of emergency or necessity is subject to no other control than that of Parliament. In cases under (2) the Decree shall be submitted to Parliament for confirmation as a law at one of the first three sessions following its promulgation.'

[1] The idea is not wholly original. Art. 57 of the Acts of the Congress of Vienna provided, with reference to the fundamental conception (*Grundbegriff*) of sovereignty, 'that the collective power of the State should remain united in the Head of the State' (*die gesammte Staatsgewalt in dem Oberhaupte des Staats vereinigt bleiben muß*).

It need not be demonstrated that political control by a Parliament constituted in the way described is of no practical importance; nor is it necessary to point out that the *confirmation* of a decree as law by the selfsame Parliament, at one of its next *three* sessions, is a bare formality. Indeed, Rocco says in his book *The Transformation of the State* that Parliament is in fact to be reduced to a mere registry for decrees. Another writer, Prof. Manfredi Sietto Pintor expressed himself in an article in the *Jahrbuch des öffentlichen Rechts* for 1927 as follows:

'In fact we have here a system which enables the Government to limit the scope of the legislative function as it suits its own purposes. Whether this be an evil or a benefit is a political question outside the purview of this article; it is sufficient for present purposes to point out the legal fact that the Law of Jan. 31st 1926 radically changed the constitutional nature of the Italian State; to a lawyer, it would appear that the promulgation of this law marked the commencement of a revolution.'[1]

Actual power in Italy has been transferred to the Government, which is in turn completely dominated by the *Capo del Governo*, the 'Leader' or 'Duce'. And the expression 'corporate State' is the flag which protects the cargo of a personal government exercised by the latter.[2]

In the German National Socialist State the sham is, if possible, more transparent still. We are told explicitly that *Führerwesen*, authoritarian leadership, constitutes the essence of the National Socialist State. The *Reichstag* is nothing but a sounding-board for the *Führer's* deliverances; it meets only when he considers it necessary to make some emphatic

[1] *Jahrbuch des öffentlichen Rechts der Gegenwart*, Bd. XV, 1927, pp. 286 et seq.

[2] For a review of the nature and functions of the Chamber of Fascios and Corporations which has since been instituted to assent to legislation, see *The Times* of 28 March 1939. It will be seen that every appointment is confirmed by the Government, the Chamber being merely a consultative body.

statement about policy pursued or to be pursued. Very considerable legislative power is delegated to the Government of the Reich, i.e. to the *Führer*. It is paradoxical that the National Socialist movement, which receives its inspiration from Teutonic myth, with a leader and political theorists who always maintain that its mission is to establish a *Germanic* State, should have set up a State which approximates more and more to the very Roman Empire which the early Teutons resisted and destroyed. Features common to the two organizations are the concentration of power in the hands of one man; the merging of the more important functions of government (Chancellorship and Presidency) in one holder, the *Führer-princeps*; elimination of the deliberative assembly; the use of violence and terror by the 'Leader' to establish his power; palace revolutions, summary execution without legal process of subordinates suspected of sedition; adulation of the *Führer* and his apotheosis to the rank of a supernatural being.

In truth, the single party State is a contradiction in terms, for the meaning of the term 'party' is a *part* or a group within the State which pursues certain political objects. If everything is *gleichgeschaltet* there can be no question of any 'party'. The plain fact is that in Germany the so-called 'party' is nothing but a piece of powerful machinery designed to crush at once any resistance offered to the *Führer*; and in this it compares with the Praetorian Guard, the Janissaries, and Mamalukes known to older autocracies.[1]

The same considerations apply to the Union of Soviet Republics. This, too, has a kind of 'corporate' franchise.

[1] Cf. Koellreutter, op. cit., p. 166: 'The "party" of the single party State is, therefore, not a party in the old sense of the word, but a political "movement". It constitutes a "political élite", inspired by a spirit of militancy, upon which, under its Leader, rests the responsibility for the existence and security of the political condition of the nation.'

The representative bodies, the 'councils' known as 'soviets', are not elected by the citizens as individuals, but as members of corporate bodies, the corporate body being a higher unit: it may be the staff of a factory, or all the hands employed in a group of factories; or again a military, naval, or territorial unit. Here too, as in Italy and Germany, only one 'party' is recognized and no opposition is tolerated. In practice the system operates as a highly organized and centralized dictatorship. Here too we meet with the phenomenon of apotheosis of the 'leader': the mortal remains of Lenin, carefully embalmed and preserved, are an object of devout veneration; whilst Stalin enjoys a large measure of adulation and adoration. Dissentient opinions and political movements are opposed by violence and suppressed by means of execution, severe punishment, and exile.

Once the single-party system is introduced, representative government is doomed.[1] There can be no formation of a collective will; the rigid organization and hierarchical constitution of the 'party' machine exclude that possibility. On accepting the system, the party member relinquishes his independence and ceases to play any part in the moulding of public opinion; he becomes a mere object for the reception and execution of orders. To disagree with the Government or to utter an adverse opinion on a question of policy is the beginning of rebellion, a breach of discipline —i.e. of party discipline—and 'disciplinary' punishment must be applied.

In a single-party State, the representative body, whether

[1] Prof. Mirkin-Getzewitsch, in his *Die rechtstheoretischen Grundlagen des Sowjetstaates*, Leipzig and Vienna, 1929, rightly raises the question (p. 40): 'Is the Soviet system in fact a representative system?'; a question which he appears to answer in the negative.

constituted on 'corporative', 'organic', or any other lines, is mere camouflage for a dictatorial, absolutist régime, the equivalent of the 'tyranny' of classical times.

It is true that this form of government does enjoy certain advantages over really representative forms, and in particular it possesses the ability to decide things quickly. It is this latter quality which in the last resort constitutes the attraction of authoritarian régimes for many people. Whether it be from ignorance or from impulsiveness and impatience, people feel a certain annoyance with and antipathy towards the slow, cumbersome way in which decisions are reached in modern democracies. This is particularly true in times of emergency, when circumstances change rapidly, and when economic and social problems are in question. In this connexion it is interesting to note that the Romans with their legal sense and political flair instituted the dictatorship[1] to meet the requirements of a state of emergency and national danger, when united action under a strong leader was essential; but that thanks to that same political sense and insight, they made dictatorship a temporary measure; the dictator was an individual in whom all authority was vested for a limited period. Dictatorship is monarchical authority; and hence from the point of view of political science the expression 'dictatorship of the proletariat' is fundamentally erroneous, another contradiction in terms. A large group cannot exercise dictatorship; it is inevitably exercised by the leader of the group, and he is in fact the dictator. But a roundabout method of reaching a decision is, objectively speaking, a disadvantage in more normal circumstances too; and subjectively it tends to irritate a good many people, including some citizens of countries with long Parliamentary histories. Prof. Pollard

[1] Cf. Mommsen, *History of Rome*, vol. i, p. 325.

begins his stimulating work *The Evolution of Parliament*[1] with an anecdote about Carlyle, which shows very clearly the irritation felt at Parliament by that astute but emotional genius. Carlyle described the House of Commons to a young officer (later General Wolseley) as a collection of 'six hundred talking asses set to make laws and to administer the concerns of the greatest empire the world had ever seen'. And at the conclusion of this conversation he expressed the hope that the promising young officer would, before he should depart this life, be entrusted with the duty 'to lock the door of yonder place [the Houses of Parliament] and turn them all about their business'. No Fascist or National Socialist could have put it more strongly than this!

It might well be answered that the 'six hundred asses' have not, when one compares their work with that produced by other systems, done so badly. It is only fair to demand that the results of their work be compared with those produced by autocracies and unrestricted oligarchies. The fact is that, as against the disadvantages mentioned, the modified democracy has advantages which more than counterbalance them; and conversely the disadvantages of the autocratic and oligarchic State forms outweigh their advantages.

For first, the possibility of rapid decision is not in itself an unqualified advantage. As Bryce has rightly observed, it endangers stability.

> 'Every constitution, like every man, has "the defects of its own good qualities". If a nation desires perfect stability, it must put up with a certain slowness and cumbrousness; it must face the possibility of a want of action where action is called for. If, on the other hand, it seeks to obtain executive speed and vigour by a complete concentration of power, it must run the risk that power will be abused and irrevocable steps too hastily taken.'[2]

[1] London, 1920.

[2] *The American Constitution*, vol. i, p. 308 et seq., 1914 ed., New York.

If all autocrats were endowed with the incomparable gifts of Julius Caesar: constructive imagination and quickness of perception, combined with a sound critical faculty and a clear intellect; remarkable adaptability together with steadfastness and moderation; a flair for organization and a suppleness of mind; a talent for devising forms of government which are new but successful: then the dangers would indeed be less considerable. But the world has never since seen such a combination of gifts. The name 'Caesar' denotes a species and has become the title used by the highest of authorities, equivalent to 'emperor'; but the nature of Julius Caesar has had no counterpart. And who can count the cases in which an autocratic government has, by ill considered and inadequately criticized decisions, exposed its State to the gravest danger or plunged it into the deepest misery?

The second great disadvantage of an authoritarian régime is this: how is the successor to be appointed or recognized when the talented founder of autocratic authority has gone the way of all flesh? The system suffers from this irremediable defect, that there is no reliable method by which the proper successor can be ascertained. A rigid hierarchical system is not designed to develop or reveal latent talents of leadership; the qualities desired in a useful subordinate or good servant differ from those of a responsible leading statesman. It is significant that so many truly great autocrats rose to power under systems which they subsequently ruthlessly destroyed or completely transformed: Julius Caesar, Strafford, Cromwell, Richelieu, and Bismarck first became prominent and showed their brilliant statesmanlike talents as gifted leaders in deliberative assemblies. What means are available to discover substitutes of equal merit when the old form of government has been destroyed?

In point of fact, the way in which a deliberative assembly conducts its business under the representative system is not a bad method for selecting suitable administrators. Continual critical discussion of collective interests; consideration, voluntary or involuntary, of both sides of every case; unceasing vigilance and readiness for attack or defence: these generally mark out the ablest in the assembly. Parliamentary leadership is not, as hostile critics so often contend, normally acquired by frothy, demagogic eloquence. The confidence of a political section of Parliament—i.e. of a group of people who know the crack of the whip, who have themselves acquired a certain ability in public speaking, public debates, and the discussion of public interests—cannot be won and retained by mere rhetoric. Insight, strength of purpose, lucid and logical expression, resolution and knowledge are all necessary. And these are calculated to produce a fairly good administrator, though they do not always do so. It has to be admitted that the qualifications of a successful Parliamentarian are not identical with those of a good administrator, though the two have much in common. Contentiousness and argumentativeness, which may be a merit in the former, are to some extent a demerit in the latter. But the great advantage which the administrator trained in Parliament possesses is that which he owes to having had his finger continually on the pulse of public opinion. This produces a feeling of confidence on both sides: self-assurance on the part of him who governs, security on the part of those governed. It further prevents undue emotion, for when feelings threaten to run too high they will, under a democratic system, cool off in a normal manner; whilst there is more reason to expect that all interests at stake will be properly considered in such circumstances than there is in the case of autocratic government.

As against this, there is indeed the fact that the duty of keeping in touch with public opinion consumes a good deal of the administrator's time and energy. Viscount Grey, who held the office of Foreign Secretary in Great Britain, rightly pointed out in a number of articles that the fulfilment of this duty deprives Ministers of the Crown of the opportunities they need for concentration, reflection, and quiet and careful thought. But for that matter, it may be said that political leaders in modern autocracies devote at least as much time to speeches designed to mould public opinion as do ministers in states under parliamentary government. And the stimuli they use have to be stronger; they are obliged to put their views in a forceful and exaggerated manner.

Much of the adverse criticism levelled against popular representative government and of the preference entertained for the new forms of autocracy is due to thoughtlessness and superficiality of judgement which are among the curses of modern times. In this connexion it is worth noticing that the apologists of the new system proclaim that thinking takes second place with them; action comes first.

'It is true', writes Alfredo Rocco, 'that Fascism is, above all, action and sentiment and that such it must continue to be. Were it otherwise, it could not keep up that immense driving force, that renovating power which it now possesses and would merely be the solitary meditation of a chosen few. Only because it is feeling and sentiment, only because it is the unconscious reawakening of our profound racial instinct, has it the force to stir the soul of the people, and to set free an irresistible current of national will. Only because it is action, and as such actualizes itself in a vast organization and in a huge movement, has it the conditions for determining the historical course of contemporary Italy.'[1]

[1] 'The Political Doctrine of Fascism', in *International Conciliation*, 1926; Carnegie Endowment for International Peace, p. 394.

We see here the phenomenon of action for action's sake only; the exalting of the power to act, without thought and without regard to value; a creed of power for power's sake; the idea that popular sentiment must be stirred up as a means to power, and a defence of demagogy as a system of government. Fascism has every reason to abhor thought; for thought is ruthlessly opposed to all this. But what is so tragic is that the power produced by Fascism must *always* be directed against something; it cannot remain static. And this brings us back to the problem of the connexion between a State's object and its form which we dealt with in the preceding chapter. If the object of the State be envisaged as the acquisition of the maximum amount of power, then the autocratic form, with its inflexible organization and complete subordination of the individual, and its putting of subjects in the position of 'objects', is called for. The State should then be organized as a unit as much as possible on the lines of an army; for according to this view it is nothing but a power-producing machine. It is the organized group of people not assembled together, whose function is to ensure the most efficient operation of its centrifugal force, i.e. of its armed forces. This being the avowed object of the State, there is no room for 'government by persuasion'; to use Slingelandt's expression, there is no *raison d'être* for any form of government in which deliberation, discussion, and persuasion finally determine the issue in matters of legislation and administration, but room only for orders and unilateral commands.

But if, as was contended in the last chapter, we should regard the object of the State as the promotion of the conditions of a richer and nobler development of human life, Aristotle's εὖ ζῆν, then a form of State is indicated which will give its citizens the opportunity to develop their

minds, and express their opinions freely, to criticize and counsel one another, and to take part in the determination of the rules of conduct which are to guide Society and the individual. In other words, a form of State is demanded which will make them all associates and *fellow* citizens. An organization of this kind balances itself, one institution being intimately connected with another. Its fundamental characteristics cannot be reconciled with an autocratic régime, in which free criticism cannot be tolerated, as it strikes at the very root of the system. Freedom of religion, freedom of the press, freedom of association are the natural concomitants of popular representative government. Both authoritarian and democratic forms of government are determined by their objects. Any one inclined to feel irritation or despair at the often cumbersome procedure and slow rate of legislation in a democracy (and every member of the Legislature, as well as most citizens, will sometimes experience these feelings) should reflect that on the other side of the balance-sheet there appear assets, in the shape of freedom to express opinions and exchange thoughts, which are of the utmost value to a free man. But he must at the same time take into account that cumbersome methods and slowness may assume proportions which make them a danger to the State. 'The King's business must be carried on' said the Duke of Wellington on an occasion when the formation of a Cabinet was fraught with great difficulties. To put the matter in another way, decisions are continually demanded in social life, and failure to make them means inadequate provision for collective interests and the possibility of decline, danger, and—should circumstances be unfavourable—of the collapse of the whole system itself.

Parties and groups are unavoidable in any self-governing

nation; but party politics in the unfavourable sense of the word—the limiting of one's vision entirely or even mainly to the particular interest of the party, and thereby the evading of responsibility for measures not popular with some important section of the people—make it difficult, may even make it impossible, for a democratic system to work. At all events it may make the system disliked, and thus give its opponents a handle. The greatest danger now facing democratic forms of government comes from those democrats whose narrowness of political outlook prevents them from understanding the system and knowing where its limits lie. When a society has a proper sense of where these limits lie, this form of State is, as Aristotle so well perceived,[1] the most stable of all. It is the most stable because of the appeal it makes to man's sense of justice. When we ask after the reason for this we are brought to the difficult question of the relation between the State and the Law.

[1] *Politics*, v, cap. 1, 9.

CHAPTER V

THE RELATION BETWEEN STATE AND LAW

THE theory of State sovereignty, in its various forms, makes the relation between the State and the law a very simple matter. Law is nothing but the expressed will of the State. It is the nature of the State to impose its own will unconditionally on others; for such is the definition of ruling, and it is of the essence of the State that it should rule. 'The State has power to rule', says Jellinek,[1] 'but ruling implies the capacity to over-ride, absolutely, the wills of others, to make one's will prevail against others. The State alone has this power to make its own will prevail absolutely against other wills. . . . The State is the unified association of men of settled domicile, a union endowed with original sovereignty.' Laband's well-known characterization of the concept of law accords with this. 'Law is the legally binding command of a legal principle', he says; and again, 'the will which finds expression in the law is always a command to comply with the legal principle contained in the law'.[2] The sanction which is behind the promulgation of law reveals 'the specific operation of the power of the State, the power to rule'.[3]

The reasoning followed by the English analytical school of Austin is analogous to this; but the power to rule is not associated with the State in the abstract but with a concrete individual or group of individuals, the Sovereign. 'Every positive law or every law simply and strictly so called', says Austin, 'is set by a sovereign person, or a sovereign body of

[1] Jellinek, *Allgemeine Staatslehre*, p. 180 et seq. of the 3rd ed.

[2] Laband, *Das Staatsrecht des Deutschen Reiches*, Bd. II, p. 2 of the 5th ed., Tübingen, 1911.

[3] Op. cit., p. 4.

persons to a member or members of the independent political society wherein that person or body is sovereign or supreme'.[1] That person is sovereign who is in fact obeyed. 'If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society.' Sovereignty is thus purely a question of fact, determined by actual relationships; its essence is habitual obedience in fact, and law may be defined as the aggregate of the commands given by that sovereign individual or group of individuals.

At the beginning of the present century this notion was attacked from different sides. Several authorities expressed doubts about the alleged absolute power of the State's will, and disputed the identity of law and supreme command. Opposition emanated both from experts in private law and from experts in public or constitutional law. As an example of the former, we have Cruet's *La vie du droit et l'impuissance des lois*,[2] which draws on legal history to illustrate the very limited power of the command-giving authority in the face of custom and popular prejudice. By this means the relation between the State and the law is completely inverted. Instead of having a purely derivative nature, law is now given a validity of its own.

Writing as political theorists, Duguit and Krabbe vigorously attacked the defenders of the theory of state sovereignty and the analytical school. Krabbe's chief work, *Die Lehre der Rechtssouveränität*, is written in a critical vein. Arguing against the notion of the State as the source of power, and the thesis that the State is invested *by nature* with this 'public power'—he says 'What I want is an explanation

[1] Austin, *The Province of Jurisprudence Determined*, 2nd ed., 1861, Part I, p. 169 et seq.

[2] Paris, 1908.

of that fact'. The position contended for appeared to him to be unacceptable, as being at variance with known facts and phenomena. And indeed it is obvious that the doctrine under examination is incompatible with any subjection of the State to law. Nor will the theory of 'self-obligation' (*Selbstbindung*), voluntary submission by the State, developed by Jellinek[1] avail to save the system: no one can undertake obligations to himself. If the will of the State of itself makes a rule binding, how can the validity of that rule be invoked against the State which is carrying out its own will? Krabbe sets up the independence and inherent validity of law against the suggestion that its power is derivative. 'Every power which meets with acceptance at the hands of Society, is legal power . . . and legal power pure and simple.'[2] But the question at once arises: how can the law possess inherent validity against the State?

Krabbe seeks to solve this problem by invoking a sense of justice operating in man. This appears in its lowest form as an instinct for justice, in its highest as a consciousness of justice, and it is every bit as active as moral sense, sense of beauty, religious sense and the like. It has nothing to do with the human will, nor is its operation dependent upon that will. Consciousness of justice is therefore a property of the human psyche which causes us to react to human conduct, both our own and that of others, and to human relations. The values set up by these reactions which belong to no other class are, according to Krabbe, justice-values.

'Law is, in consequence, the expression of one of the many judgements of value which we human beings make, by virtue of our dispositions and nature. We subject to our judgement all

[1] *Allgemeine Staatslehre*, p. 369 et seq.
[2] *Die Lehre der Rechtssouveränität*, p. 5.

human conduct, indeed all reality; and we distinguish as many different kinds of value as we apply different kinds of measure.... The recognition or otherwise of these values is not a matter of *choice*; we cannot be indifferent or not at will; our minds react within us, whether we want them to or not, and we feel ourselves subjected, as a consequence of this reaction, to what we call the good, the beautiful, and the just. The rule of law likewise is due to human reaction to the sense of justice, and is not a matter of external legal authority but an internal human matter.'

This theory certainly takes the foundation for the validity of law away from the scope of the State's will. Various objections have been raised to it, and they are, indeed, fairly obvious.

Against Krabbe it is said, 'You assume the existence of a property of consciousness—are you justified in making this assumption? Is not your "consciousness of Justice" but an "idle name" (to use Grotius'[1] expression) which in fact but thinly conceals self-interest? Did not Duguit[2] describe the "sentiment de justice" as "un prolongement du sentiment egoïste"? And even if this is not the case, does this so-called sense of justice give us any standard of value, can it produce a standard of value? Do not such standards vary from century to century, from year to year, from nation to nation, from group to group, indeed from man to man?'

We may take as an example the severe criticism to which Krabbe's views were subjected by the Dutch thinker Struycken. How can we, he asks, 'enthrone anything so relative, arbitrary and variable as the individual instinct, sense, or consciousness of justice, to whomsoever it may belong and whatsoever it may contain?' 'To make the individual sense of justice any kind of basis for law and the State spells anarchy, for the simple reason that the greatest

[1] 'Non desunt... qui hanc juris partem ita contemnerent quasi nihil eius praeter *inane nomen* existeret', *De iure belli et pacis*, Prolegomena, Par. 3.

[2] *Traité de Droit Constitutionnel*, 2nd ed., Paris, 1921, Part I, p. 51.

possible discrepancies in point of form, content, and degree are to be found in people as a whole; and how can he get a legally ordered society out of such anarchy?'

Prima facie this argument is a strong one. The human sense of justice does appear at first sight to be something particularly variable and arbitrary; other writers have made the same point. 'The unfortunate thing', says Prof. Ritchie, 'is that those instinctive feelings differ so much in different persons. A little reflection may show a discrepancy between outward law and inward sentiment; but a little more reflection will show divergence between the sentiments of different persons, or at least between the sentiments of different classes of persons'.[1]

But the first impression is not confirmed when the human sense of justice is deliberately subjected to analysis. In another work[2] I have myself carried out an empirical analysis of this nature. The results in fact show the existence of some degree of uniformity in the human sense of justice. There is a uniformity which may be called the Law, or Postulate, of Proportion. The reactions of the human sense of justice may be expressed, in the light of the results obtained, in the following formula: 'All members of a legal Society are equal and enjoy the same status as regards sharing in the conditions productive of good and evil, save in so far as any member himself creates conditions productive of some special good or evil; any good or evil that may result from conditions created by a member acting independently shall affect that member only.' Justice-valuation follows this standard of measurement, and it is in accordance with it that the human sense of justice functions.

[1] David G. Ritchie, *Natural Rights, A Criticism of some Political and Ethical Conceptions*, p. 85 of the 3rd ed., London, 1916.

[2] Not translated into English.

And these results solve some of the difficulties we have met with.

In the first place they make it quite clear that positive law cannot be enacted by the authority of the State in accordance with its own sweet will; the citizens' sense of justice is apt to react when power is abused by its disproportionate exercise, and this reaction may on occasions overrule the power of the authorities, simply by virtue of the uniformity in the reaction. The reaction may be gradual, taking the shape of customary law or common law, or it may be sudden, in the form of revolutionary legislation. This disposes of Struycken's argument.

On the other hand we see that Krabbe's view that the sense of justice of the citizens of a country is 'sovereign', in the ordinary sense of the word, is untenable. The reason is that the sense of justice is not the only active force operating in the human psyche; there are others. Whether the sense of justice will prevail depends on the relation between those forces, a question the answer to which rests largely on the nature of the national character. But when certain situations develop, or a series of events offends men's sense of proportion in the case of a nation of the 'sanguine' type, then it is highly probable, to a marked degree, that the reaction produced by the sense of justice will keep the upper hand. We see, then, that there is at most a tendency on the part of the sense of justice to prevail and realize itself, a tendency which is always stronger at the higher stages of mental development, when consciousness is more sensitive and when the members of society are more numerous. It follows that the expression 'sovereignty of law' is apt to confuse, and should be avoided.

It is noteworthy that our conclusion harmonizes with the theory of revolutions formulated by Aristotle. In the *Politics*

Aristotle propounds a theory of revolutions which bears witness to his remarkable scientific objectivity, keen analytical perception, and genius for co-ordinating a number of apparently isolated phenomena. The turbulent state of Greek politics, of course, provided him with plenty of material for empirical research. Here is his conclusion:

> 'Everywhere inequality is a cause of revolution.... The universal and chief cause of this revolutionary feeling is . . . the desire of equality, when men think that they are equal to others who have more than themselves; or, again, the desire of inequality and superiority, when conceiving themselves to be superior they think that they have not more but the same or less than their inferiors....'[1]

The special causes of revolutions which Aristotle proceeds to summarize—insolence on the part of rulers, contempt of inferiors, abuse of power, election intrigues, carelessness and neglect of trifles—can all be referred to the general, fundamental rule. They all amount to *abuse*, official misconduct, by which the proportionate equality postulated by man's sense of justice is disturbed.

Our results further afford a complete explanation of a remarkable phenomenon, namely the extent to which the idea that the principles of justice apply to and against the actions of the State itself now finds acceptance. The doctrine that the State is responsible for its own wrongful acts provided Krabbe with his most effective argument against the theory of State sovereignty. Jurisprudence has gradually come to accept the idea of this responsibility, in the face of the recognized theory of the sovereignty of the State. Now the results of the investigation referred to above make this attitude intelligible. For, whenever the organs of some particular system, acting on its behalf, so act as to produce the conditions for some particular evil, then the Law of

[1] *Politics*, Book V, 1 and 2.

Proportion automatically calls for compensation for the evil effected. Thus the dogma of State immunity (*dogme indémontré et indémontrable*)[1] slowly loses ground; but no explanation of its decline can be satisfactory unless the doctrine of State sovereignty (which is in complete accord with the dogma in question) be repudiated. The administration of justice—given adequate safeguards for the independence and impartiality of the judiciary, as is the case in most of the Western world—shows us justice-valuation at its purest. Light is thrown on the interests at stake by the conflicting parties to the litigation; from a scientific point of view law can be regarded as a series of experiments with the sense of justice. Unfounded and ill-founded theories are not proof against this, in the long run.

Another product of our inquiry is that the theory of the 'rule of the strongest' is made more transparent and reduced to its proper proportions. According to the results obtained it is, surely, right and just that greater opportunity be afforded to those more competent to improve the conditions of life of the Society or to prevent those conditions from deteriorating; to increase welfare, prevent loss, damage and misfortune. Now those most competent will often be the 'strongest'; but the concept of 'strength' here referred to must be limited so as to denote only the strongest in this particular field. Authority is, therefore, not given to them because they are the strongest, and have seized it, but because they are best able to discharge the functions of leadership. Owing to the differentiation in the functions of a political unit at the higher stages of development, 'strength' pure and simple would now be too rough-and-ready a test of ability. Relations have altered, and nuances have become finer.

The energetic, courageous, resolute and resourceful man

[1] *La Réparation des dommages de guerre*, Paris, 1917, p. 58.

who can secure victory for his people in warfare will, when conditions are simple, often prove an able organizer in peace-time. As was explained in the chapter dealing with group psychology, the factors decisive for success in war are a talent for utilizing the available material to the best advantage and arranging the subordinate units in an intelligent way. This presupposes qualities in the commander of armed forces which, generally speaking, constitute the necessary equipment of a good ruler with organizing ability. While we seldom find these qualities so strikingly combined in one man, as they were in Julius Caesar and (to a lesser degree) in Cromwell, Frederic the Great, and Napoleon, it is reasonably probable that in simple conditions the efficient and reliable military leader will make a determined and powerful ruler and possess organizing ability. The Romans acted on the view that this is true when they made the Consulate part of the scheme of their constitution, and, taken by and large, the plan was a successful one, though some disasters can be ascribed to it. But on the development of a finer technique in such spheres as those of justice, administration, and diplomacy, the tasks of administrative, judicial and political organization and leadership become differentiated. There remain, it is true, a number of psychical characteristics which must be part of the mental equipment of persons entering on any field of State activity. Quick reaction, the power of concentration, intelligence, and a sound memory; discrimination and quickness in decision, or in other words resourcefulness: these will qualify a man for leadership in any sphere of the work of the State. There are, however, differences in the requirements of different functions; and this quite apart from the fact that experience has so increased in every sphere, and technical knowledge has become so complex, that complete comprehension of the

whole field by any one mind, however gifted, is no longer possible. The mere existence of different kinds of group organizations involves the emergence of a variety of requirements.

We may also revert at this stage to the results of the analysis made in the chapter dealing with the theory of the formation of groups. The requirements necessary for capable and efficient leadership of an organized group of people assembled together, such as an army, differ from those called for in a leader of a group not assembled together, such as the State. In the former case it is requisite, in order that the objects of the organized group be attained, to carry out decisions promptly, for decisions complement one another. There is little or no time for deliberation; immediate action is essential or serious loss (and even annihilation) may result. Organized action in this case cannot be achieved by negotiation and the persuasion of some members of the group; it must be by commands. In the latter case immediate decision is mostly unnecessary for the purpose of achieving the object, which is the proper and just ordering of social life; indeed, it is usually a disadvantage, because the likelihood that in such circumstances some factors will be overlooked and others misjudged is considerable. This likelihood does, of course, exist in the case of the assembled group, and the consequences of overlooking and misjudging are then fatal. But in this case the risk of error is unavoidable, because a failure to decide at once has even worse consequences—assuming delay to be at all possible. This, incidentally, is what makes warfare so much a game of chance, as was fully realized by such eminent strategists as Julius Caesar.

But legislation in ordinary civil life, the ordering of the mutual relations between citizens, practically never calls for immediate decision. On the contrary, consideration

and deliberation, the careful marshalling and investigation of available data, are not only possible but actually favour the attainment of the object. The most appropriate method of achieving this object is not by means of commands but by persuasion. And the psychical qualities required for this differ in various respects from those needed for military leadership. Only a few minds have that peculiar, all-round development of talents which equips their possessors for both kinds of functions; they include the incredibly adaptable mind of Julius Caesar and that of Themistocles. The functions of general and statesman are thus distinct, and he who is 'strongest' as general is not by any means necessarily 'strongest' as statesman. From the point of view of Society it is a fatal mistake for the general to use his actual power in order to usurp the functions of the statesman, or to be compelled to do so by force of circumstances. The history of many South American republics will illustrate this point; and it cannot be denied that the Duke of Wellington did not do well as a statesman.

In modern political organizations the desirability of conferring leadership on the most competent person in each department of State activity has been recognized, and efforts are made to achieve this object by resorting to certain safeguards. At the same time, considerable difficulties are inherent in the very nature of the modern organization. Every safeguard imposed increases the likelihood of the organization becoming too inflexible, owing to the fact that objective tests have to be applied. Two such tests are fairly obvious: examination and seniority. These are somewhat rough-and-ready and in various ways unsatisfactory, especially when we come to the higher posts, where book-learning and technical training are not the only desiderata: some independence of judgement, a sound critical faculty,

resourcefulness and constructive imagination are also called for. No infallible test has yet been discovered. Because of this we resort to the experienced judgement of those who are constantly in touch with previous results, generally the chiefs of departments concerned. But this involves a departure from the field of objective tests, and we are compelled to enter that of subjective judgement with all its attendant dangers: personal sympathy or antipathy on the one hand, toadying and flattery on the other hand, nepotism, departmental jealousy, &c. The national character plays an important part in determining the nature and weight of these objections, and so does tradition; while the disadvantages may also be diminished by the possibility of public criticism and, eventually, by a right of appeal to an impartial administrative tribunal.

In democratic States, as discussed in the preceding chapter, the recognized criterion of competence to discharge general legislative and administrative duties is the proven confidence of the electorate. This, as was pointed out (p. 134 *ante*), is, generally speaking, not a bad test; at all events in democracies with a certain amount of political experience and training. Here, too, seniority is a factor which plays an important part in practice. The sitting member of a representative assembly has a very important advantage over inexperienced opponents, especially in countries which have adopted a system of proportional representation. Parliamentary experience improves knowledge of 'the business in hand' and of the general trend of legislation; it makes for all-round knowledge and improves the critical faculty. But the seniority system also has its weakness; slackness may easily set in, hard-and-fast habits of thought and methods of conducting controversy be developed, and too dogmatic a view be taken of the facts of a situation. It also

impedes the promotion of gifted, energetic and imaginative younger men.

'But why should a majority of votes give you a title to authority?' may be the next question. The solution of this problem is likewise to be sought in the results of our analysis for the Law of Proportion affords the explanation.

The recognition of the validity of the majority decision is indeed rather remarkable. On the one hand, its correctness is commonly accepted as a direct manifestation of the operation of a sense of justice. *Est autem manifeste iniquum ut pars maior sequatur minorem*, says Grotius: 'it goes without saying that it would be unfair for the majority to have to obey the decision of the minority'.[1] Unorganized communities consider this quite 'natural' as well; when a party of children have to decide what game they shall play and who is to be leader, it is tacitly assumed that a majority of votes is to decide the question. On the other hand, few problems have occasioned so much difficulty to political science and logic as this one. The alleged self-evidence of the validity of the majority decision is, indeed, a problem in itself. Rousseau had it in mind when, in his *Contrat Social*, he asked why a dissentient minority should really be subject to the decision of the majority, and should be bound to accept this decision against its own will? He sought to solve the difficulty by simply denying it. 'The question is wrongly phrased.' Whenever a proposal is put to the vote the question is whether it accords with 'la volonté générale, qui est la leur'. 'If the majority decides against me, all that that proves is that I have made a *mistake*, and that

[1] Grotius, *De iure belli et pacis*, Liber II, cap. par. 19: *naturaliter . . . pars maior ius habet integri*: the decision of the majority determines the issue for the whole. *Manifeste iniquum*: it is considered *just*, that the majority decision should be binding. This is quite different from an appeal to the *actual power* of the majority.

what I thought was "la volonté générale" was not so in fact. If my private opinion had gained the day, I should have acted contrary to my will, and therefore should not have been free.'[1]

This is a highly artificial, unreal, and in fact a paradoxical line of reasoning. The attempt to base the binding force of the majority decision on the individual will is as foredoomed to failure as the attempt to base that binding force on the will of the State. The reason is that validity or invalidity is made to depend on a variable factor. Incidentally, the content of the individual will is depicted as purely a matter of chance; in practice this is *not* the case.

The binding force of majority decisions cannot be based on the individual will; but it can be referred to the individual's sense of justice. It is because the individual's sense of justice reacts in accordance with the Law of Proportion that the individual objectively considers it just that every one should share, equally and in the same proportion, in the making of decisions which determine the life of the group, in the act of the group, and in whatever good or evil results therefrom.[2] The citizen wants, as an individual, something different from that which the majority decision determines; but, acting in accordance with this sense of justice, he will resign himself to a mode of deciding by which no part of the members of the group, no minority—is given a disproportionate share in the decision. That is felt to be *manifeste iniquum*, as Grotius put it. The only exception to this is when a minority or particular individual is specially qualified to make a good

[1] *Du Contrat Social*, Book IV, ch. ii, *Des suffrages*.

[2] 'A most just law, established by the prudent foresight of holy princes, ordains and determines that what touches all shall be approved by all; and similarly it quite evidently requires that common perils shall be met by remedies devised in common;' from the Summons to the Parliament of 1295, addressed to the Clergy.

decision; then the Law of Proportion will justify the giving of a greater share in the power to decide, in proportion to the special ability and competence of the *pars minor*. But evidence of this special ability must be given. In the various forms of suffrage based on special qualification which are to be found in legal and constitutional history, we in fact find examples of efforts to lay down objective conditions for determining the possession of this ability. The efforts have met with little success, and have led to a number of artificial suggestions (such as Guizot's ingenious proposal for suffrage based on the census) which have sooner or later been abandoned.

The requirement of proportional participation in group decisions calls for recognition of the majority principle, as it hardly ever happens that complete agreement is attained[1] and some decision must be made if serious loss, perhaps even the destruction of the group, is not to ensue. But submission to majority views should be made applicable only to those spheres of the group's life in which decisive decisions are inevitable. Some things are outside those spheres. Thus in the sphere of religion and that of the sense of truth 'no Man', as Locke says, 'can so far abandon the Care of his own Salvation, as blindly to leave it to the choice of any other, whether Prince or Subject, to prescribe to him what Faith or Worship he shall embrace'. It follows that such power cannot be given to authority by popular resolution. It would, Locke continues, in fact be impossible: 'For no Man can, if he would, conform his Faith to the Dictates of another. All the Life and Power of true Religion consist in the inward and full Persuasion of the Mind; and Faith is not Faith without believing'. As William the Silent had already put it: 'Compulsion cannot touch the soul.' More recently, Loisy observed that one

[1] Gierke, *Das Deutsche Genossenschaftsrecht*, Bd., III, p. 153 et seq.

'cannot kill ideas with blows of a stick'. And Dean Inge has said 'a man may be forced to unsay, but not to unsee'.[1]

No amount of power held by authorities has displaced this opinion, and in modern states no right to bind consciences is recognized. This is expressly declared in American Declarations of Rights, e.g. in Article XVI of that of Virginia: 'That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the duty of all to practice Christian forbearance, love and charity towards each other'. Modern constitutions have borrowed this kind of clause from the French *Déclaration des droits de l'homme et du citoyen.*

Finally, the results of the analysis of the sense of justice explain the phenomenon mentioned in Chapter III (p. 70 et seq., *ante*) that the State is bound, when taking measures to achieve its various objects, by the values set by justice. As the results have shown, the sense of justice postulates the sharing of burdens and benefits. This automatically affects acts or measures taken by the State to achieve its aims, as it does everything else. The postulate is of universal application and there is no reason why the State should be excluded from its sphere.

The State, then, is subject to the law, which is quite a different thing from its being identical with the law, as Kelsen would have it. The solution produced by the Viennese school for the problem of the relation between the State and law reminds one rather of a drowning man clutching at a straw. Kelsen, like Duguit and Krabbe, appreciated the fact that the theory of state sovereignty—

[1] See further p. 244 et seq., *post.*

the notion that law and order were products of the will of the State—was no longer tenable. He was also constrained to admit that the State was bound by the law. The amazing answer he gives to the question of how this can be is 'that the State's order and law and order amount to the same thing, and the State is the system of values itself'.

The reasoning which led to this conclusion is indeed interesting and ingenious. Having demonstrated that the State is an organized community with force at its disposal (*Zwangsordnung*) Kelsen deduces that the State and law are identical. 'As soon as we regard the State as an organism,' he says,[1] 'we can no longer contrast it with the law. State and law fall within the same category, the "normative organism". And when we see how, according to current opinion, the element of compulsion is the essence of the law's system of values, then both law and the State are "compulsion organisms" in the sense that each is a system of values prescribing the use of force' (*ein System zwanganordnender Normen*). 'And this proves the identity of the State and the law', says Kelsen. 'When we have described the State, we have defined the law.' It is naïve and short-sighted, he proceeds, to associate material, concrete things like arms, fortresses, and the means of production (the allusion is to Lassalle's famous epigram: 'The State: that is, the guns and bayonets of the army, the sabres and revolvers of the police') with the State's machinery for compelling by means of force. To do this is to lose sight of the fact that these are but inanimate and unimportant things, and that all that matters is the use to which they are put. It is only in relation to human conduct that machines and machine-guns play a part in the social scheme. The rule or standard of value to which this human conduct conforms or seeks to

[1] *Der soziologische und der juristische Staatsbegriff*, p. 86 et seq.

conform is the decisive factor on which everything depends. There is no power in the mere existence of these things, of this gallows or that machine-gun; power lies in the fact that those who operate them are actuated by the appreciation of values which they consider right and which, being, as an aggregate, a system for compulsion by means of force, constitute collectively the State or the law. But when all power lies in the actuating force possessed by certain values, then there is no point, so Kelsen contends, in representing the State as a power 'behind' the justice-values whose function is that of putting them into practice. For the State is itself an ideal organism which is being 'put into practice'. The moment its ideology loses its actuating force, the power of the State will cease, though there be just as many gallows and machine-guns as before. 'The State is nothing but an idea, an idea of order' are the words with which the chapter concludes.[1]

This theory is provocative, and some of the points made have, I believe, elements of value in them. Amongst other things, what is said about Lassalle's epigram, by which many people are so easily impressed, is correct. In the last resort 'power' is not something material, but something based on psychical processes. Hume's analytical mind had, in fact, perceived this long before:

'It is . . . on opinion only, that government is founded, and this maxim extends to the most despotic and most military governments as well as to the most free and most popular. The Soldan of Egypt or the Emperor of Rome might drive his harmless subjects like brute beasts against their sentiments and inclination; but he must, at least, have led his mamelukes or praetorian bands, like men, by their opinion'.[2]

[1] *Nichts anderes als ein Gedanke, ein Ordnungsgedanke ist der Staat.*

[2] *Essays*, Part I, p. 27 et seq. of the 1793 ed.

State power, we may agree, is a psychical phenomenon, and the State an organized system; and law likewise is a psychical phenomenon, law and order an organized system. This is all very true, but does it make the State identical with the law? Not at all. Kelsen's argument contains a logical fallacy when he infers, from the fact that state organization and the law's organization both belong to the same more comprehensive concept—namely 'system'—that they are identical. The State and the law can both be classed as 'systems', i.e. as composite wholes, composed of interconnected phenomena, and in fact of phenomena which the final analysis has shown to be psychical in character. But that does not prove that they belong to the same species of that genus, as if it were a matter of convertible terms, two names for the same thing. If that were the case, we might well ask why language should produce two names. We can indeed see how erroneous Kelsen's reasoning is when we think of various compound expressions current in language. Take, for instance, 'act of State', 'Chief of State', 'State interests'. If one attempted to substitute 'law' or 'legal' for 'State' in these expressions—as one ought to be able to do if the suggested identity were real—it would not work; the result is either some meaningless combination of words, or a phrase denoting quite a different idea, e.g. legal interest.

It follows that the identification of the State with the law cannot be correct. Yet it is, I think, easy to see how Kelsen reached his conclusion. Those who make language tend more and more to apply (as is apparent from the above) the word 'State' to the composite complex of organs which serves to promote the common interests of a human group which has become sedentary. At the higher stages of development the need for predictable conduct as regards those

organs persistently increased; they had to be constituted accordingly, and rules came into being. These rules are part of the system of values, of the legal order. The organs (of the State) are bound by and have a duty to follow them; it is even right to say that at the higher stages of development a state which did not, in a general way, in fact obey those rules would be unable to exist as an organism. This subjection of organs of State to the enacted legal rules becomes more and more necessary as the organism grows more complex and its parts more interdependent, the reason being that departure from predicted conduct is increasingly likely to hamper the working of the delicate machinery of the system. But this does not alter the fact that the organ which works, acts, and decides is something other than the rule of conduct, the value, which the organ must strictly conform to in order to discharge its function properly; and that the organism, the State, is something other than the code of rules, the law, or the legal order. When we use the two words we focus our minds on different parts of the phenomena. When we use the word 'State' we mean the organism itself, when we use the word 'law' in the sense of positive law or legal order, we mean the system of rules prescribed by that organism. Granted that without those rules the persons and combinations of persons composing the organs could not exist as such: yet the recognition of the fact that the complex of rules of conduct is a condition precedent to the existence of the State does not make State and law identical. It would be a logical fallacy to reason that because x is a *sine qua non* of y, $x=y$.

This identification misled Kelsen, as can be demonstrated. He is indeed right in saying that 'power' does not lie in the things by which it is exercised, but in the actuating force of the ideas by which the people who handle those

things are governed. But why should that actuating force consist only in the *values* which they deem valid 'and which, as a system of enforced order (*in ihrer Totalität als Zwangsordnung*) make up the State or the Law'? At the very least some further evidence would be necessary before this could be accepted.

We can go farther, and say that proof is impossible. It is not only conceivable, but has indeed on numerous occasions been known to happen, that the people who handle the instruments of power have been actuated by motives other than respect for legal values, e.g. by attachment to a respected and popular general, an efficient commander of praetorian guards, a *condottiere*, a Wallenstein; by desire for glory; by greed; by promise of reward; by hope of plunder; or even by tradition or fear. The organism which possesses actual power may function though actuated by ideas other than those of legal order. Who was it who obeyed the values of the law when on a fatal day machine-guns were fired off at Vienna under Chancellor Dollfuss? Reality at Vienna cruelly and tragically gave the lie to the abstract theories of the Viennese school of *reine Rechtslehre*.

The theory of the identity of State and law is therefore found to be untenable. The conclusion we have reached is this: the relation of the State and the law is not one under which the law is a product of the State's will, nor is it identical with the State; but there is this relationship, that legal rules apply with equal force to the organs of the State. Actions by the organs of State on behalf of the State entail responsibility for the normal consequences of such actions. In order to make this responsibility effective modern states have sundry codes which, from a technical legal point of view, differ considerably: such variations are due to differences in the historical development of the institutions

concerned, especially as concerns *droit administratif*. This, however, is a matter of the positive constitutional law of the various countries concerned, and is outside the scope of this book. The general problem of the subjection of the State to the law, which is a matter for political theory, has been solved in the manner indicated.

CHAPTER VI

COMPOSITE STATES

I. CONFEDERATIONS AND FEDERAL STATES

THE State, then, is a system which is organized and governed according to and by law, a system by which provision is made for collective interests in a particular territory. Now it is a recognized phenomenon in history for systems of this kind to merge or interlock, as the result either of conquest and annexation or of agreement. We can distinguish several different ways in which systems have in fact been so connected, and a detailed classification would reveal a wide variety of forms.

In dealing with the different kinds of relationship between whole and part in such collections, works on political science generally distinguish certain types and describe them by different names. The names in question are 'confederation', 'federation', or 'federal state', and 'simple' or 'unitary' state.

The classification is in common use, but to all intents and purposes agreement is limited to terminology. There is hardly a department of political theory on which there is so much divergence between different writers as exists regarding this point.[1] Nor is this surprising. Development in this field is still in full swing, and one has to be very chary of dogmatizing about distinctions. Such dogmatizing has been the cause of more confusion and misunderstanding than almost anything else.

'Modern political science', says Jellinek in his *Allgemeine Staatslehre*, 'took a long time before it made a thorough and comprehensive survey of *Staatenverbindungen*. Clear understanding of these relationships is, moreover, impeded in many ways by current theories

[1] See Prof. S. Brie, *Theorie der Staatenverbindungen*, Breslau, 1886.

about the State, from which the impossibility of this or that form of connexion is *deductively* proved. It may well be that there is no department of public law in which the consequences of basing judgements on data in accordance with abstract ideals are more conspicuous.'

The inductive method should be insisted upon in this case especially; inference from general propositions is, here above all, highly dangerous.[1]

This is an excellent piece of advice, which, unfortunately, Jellinek himself failed to follow consistently. For what, according to Jellinek, is the difference between a 'confederation' and a 'federal state'? It depends, he says, on where *sovereignty* is situated. In the case of a confederation sovereignty resides in the constituent States; in the case of the federal state it is in the comprising whole. 'Confederation does not detract legally from the sovereignty of the confederated states; rather, they bind themselves mutually, with the object of maintaining their sovereignty, to exercise certain functions in common only, or to exercise them in common in certain specific circumstances.'[2] The federal state can be contrasted with this. 'The federal state is a sovereign state consisting of a number of states, State authority arising from the member states bound together as a State unit.'[3] 'The member states of the federal state are not sovereign; a greater or smaller share in the exercise of the State authority of the combined State is allotted to their supreme organs of government and thus to themselves, by the constitution, in *substitution* for sovereignty.'[4] This concept of sovereignty needs very delicate handling. Bryce, it may be remembered, characterized it as: 'that dusty desert of abstractions through which successive generations

[1] Jellinek, op. cit., p. 737.
[2] Ibid., p. 769.
[3] Ibid., p. 762 et seq.
[4] Ibid., p. 770.

of political philosophers have thought it necessary to lead their disciples.'[1]

The fact of the matter is that the word 'sovereignty' can be used to prove practically anything and therefore proves nothing, having in the course of time been employed in so many different senses, and still being equivocally used. It was originally a relative term. 'Sovereignty' (from the Medieval Latin *superanus* and *superanitas*) means the highest authority in a *particular* field. 'Cascuns barons est souverain dans sa baronnie,'[2] i.e. as regards internal affairs of his barony, the baron is answerable to no one. But it is also, as regards the King, used in relation to *his* function: 'Voirs est que li rois est sovrains par desor tous et a, de son droit, le général garde de son roiame'[3] (Beaumanoir)[4]. On the rise of the royal power and the breaking of the independent power of the barons, the qualification 'sovereign' came to be applied exclusively to the centralized supreme authority, the King.[5]

This is another example of the meaning of a word altering when the function it denotes changes.[6] The word 'sovereignty', as Duguit rightly observes,[7] which used simply to indicate the *nature and character* of the royal power (as the

[1] James Bryce, 'The Nature of Sovereignty', in *Studies in History and Jurisprudence*, Oxford University Press, 1901, vol. ii, p. 504.

[2] 'Every baron is sovereign in his barony.'

[3] 'It is a fact that the king is sovereign above all and has of right the general keeping of his realm.'

[4] *Les coutumes du Beauvoisis*, Beugnot ed., 1847, vol. ii, p. 22.

[5] Pasquier, a sixteenth-century author, wrote: 'We see how the word "sovereign", which formerly applied equally to all those possessing the highest, though not absolute, power in France, has with time been restricted to designate the highest of the highest only, i.e. the king.' *Recherches sur la France*, Livre VII, ch. xvii, Paris, 1617, p. 849.

[6] Cp. Carré de Malberg, *Contribution à la théorie générale de l'État*, p. 73 et seq.

[7] *Les Transformations du Droit public*, Paris, 1913, p. 9.

'supreme' power) comes to mean the royal power itself. Bodin describes sovereignty as follows:

'Sovereignty is the absolute and perpetual power of a State, equivalent to the Latin *maiestas*; it is the supreme power to issue commands.'

Sovereignty must indeed be 'puissance absolue':

'in consequence sovereignty granted to a Prince on terms and conditions *is not properly sovereignty* or absolute power: except the conditions be those imposed on the Prince, either by the law of God or that of nature at the time of his creation.'[1]

He describes the outstanding characteristic of sovereignty in these terms:

'it is the power to issue law to the community in general and every man in particular. But to say this is not enough; we must add, to enact law *without the consent of any superior, equal or inferior.* If the Prince can enact law only with the approval of a superior, he is in truth himself a subject; if only with that of an equal, he will have a companion in authority; if his subjects have to concur—whether as senate or people—he is not sovereign.'[2]

Sovereignty thus comprised *full* legislative and administrative power, and these belonged to the King. It was in accordance with this theory that the French kings governed. It was also what they were taught. In 1851 the ex-Minister Falloux published a manuscript attributed to Louis XVI when Dauphin, and entitled *Réflections sur mes entretiens avec M. le duc de Vauguyon.* In this we read, among other things:

'To rule men is to defend them against the injustice of others, and to force them to be just themselves, at all events to their compatriots; this is the goal to which I must press, the principle which must inspire

[1] Bodin, *Les six livres de la République*, Book I, ch. viii, De la souveraineté, pp. 122 and 128 in the 1583 ed., Paris. From a theoretical point of view the restriction put on sovereignty by divine law and natural law is of great interest; but the context shows that the bearer of sovereignty himself determined the limitations, at his own will.

[2] Ibid., p. 221.

my every action. That they may fulfil their duty it was that Kings received at God's hands the greatest and *most absolute power* which He ever entrusted to one man over others: the power of legislation for enlightenment, administration for control, jurisdiction for punishment and reparation. . . . It is of the essence of the French monarchy that every kind of power rests on the head of the King alone, and that no individual or group of individuals exists capable of standing in the independence of his authority.'

The Revolution was directed against this absolute power of the monarch, and broke it; but revolutionary terminology retained the notion of sovereignty. The difference was that this sovereignty was said to reside 'in the people'. Art. 3 of the *Déclaration des Droits de l'Homme et du Citoyen* solemnly declared: 'The principle of all sovereignty rests essentially in the Nation. No group or individual can exercise authority except when it issues directly from that source.' And Title III of the Constitution of the 3rd September 1791, 'Des Pouvoirs Publics', provides: 'Sovereignty is single, indivisible, inalienable, and indefeasible. Sovereignty belongs to the Nation. No section of the people, and no individual can claim to exercise it.'

This was pure Rousseau, being an extract from his *Contrat Social*, Book I, chs. 1 and 2. In the latter chapter Rousseau ridicules 'nos politiques' who 'ne pouvant diviser la souveraineté dans son principe, la divisent dans son objet.' And this he characterizes as sleight of hand, like the trick performed by Japanese conjurors, who chop up a child before the very eyes of the audience, throw the pieces into the air, and then produce the child alive as an undivided whole.

Despite this, it was held in a celebrated judgment of the United States Supreme Court, presided over by the eminent jurist Marshall,[1] that (p. 410) 'In America, the

[1] *McCulloch* v. *State of Maryland* (1819) 4 Wheat. 316.

powers of sovereignty are *divided* between the government of the Union and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.' And an earlier passage, concerning the Union's system of government, runs: 'This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only *the powers granted to it*, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.'[1] Division of sovereignty is here clearly recognized: the term is obviously treated as a relative one, denoting supreme power in respect of particular matters.

And in the Swiss Federal Constitution Art. I speaks of twenty-two *sovereign* cantons and Art. 3 provides: 'The cantons are sovereign *in so far as their sovereignty is not limited by the Constitution*, and as such they exercise all rights which are not delegated to the Federal Government.' Once more we have a system of divided sovereignty, the word being used as a relative term, i.e. as meaning supreme power as regards certain matters.

Reverting now to the difference between a confederation and a federal state, it is clear from the above that 'sovereignty' is not always a useful test of the distinction. For, if the term is taken to mean absolute or plenary power, then member states of a confederation do *not* enjoy sovereignty; for some authority is always delegated to the combined whole. The constitution of the old Dutch Republic provided, by Art. 10 of the Union of Utrecht, 1579, that none of the

[1] James Parker Hall, *Cases on Constitutional Law, selected from decisions of State and Federal Courts*, 1913, pp. 925 and 923.

constituent provinces or cities should enter into treaties with neighbouring countries without the consent of the United Provinces; by Art. 12, that there should be unity in the matter of coinage; by Art. 13, for freedom of religious exercise. Again, limitation of the rights of member states is very clearly provided for by the Articles of Confederation of the United States of America, 1777. Art. 9. says:

'The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances', &c.

'The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated . . . appointing all officers of the land forces in the service of the United States, excepting regimental officers', &c.

If, on the other hand, sovereignty is used as a relative term, i.e. as meaning supreme authority as regards certain matters, the member states of federations also enjoy sovereignty, as pointed out above. The term cannot therefore be used to denote a characteristic by which to distinguish between the two types of State.

The truth of the matter is that we should not argue *a priori* from the concept of sovereignty but must make facts and experience our basis. The facts conducing to and concomitant with common circumstances, collective interests, and in consequence common objects, vary considerably in degree and extent. The division of the burden of providing for the common interests of human groups which have established contact with one another may therefore be

settled in different ways. Once we get away from the idea and dogma of absolute sovereignty, we find that there is no theoretical objection to settling the relation between the different systems of provision for common interests either in the way in which it was done by the Union of Utrecht or as it was done in the original American Articles of Confederation or in the American and Swiss constitutions now in force. The terms of settlement which are to regulate the relation between members of those corporate associations formed to promote common interests then become a practical question, the answer to which depends on the intensity of the feeling of unity. I say a practical question; but we should beware of a possible misunderstanding. Practicability is a matter for the constituent authority. Once the constituent body has adopted and worked out a system, the system becomes one of legal values; its application is a matter of justice. For the 'framers of the constitution' the allocation of legislative power as between the organs of the Union and those of the member states was a matter of practicability and legislative wisdom; when by Art. I, sec. 8, the allocation had been made, it had become a legal value, henceforward to be applied by those courts of law enjoying jurisdiction to interpret the Constitution, and it was in fact so applied.

The settling of the mutual relations between the organs of the comprising whole—the 'Generality', 'Union' and 'Bund'—and those of its members—the 'lands' or 'provinces', 'states', and 'cantons' respectively—was carried out in a very unsatisfactory way by the Netherlands, under the Union of Utrecht, and by the American and Swiss Confederations under the Articles of Confederation, and the provisions of the pre-1848 Swiss *Eidgenossenschaft* respectively; whilst those of the American and Swiss constitutions at present in force are comparatively effective. The term 'sovereignty' throws

no light on the subject and tends rather to obscure the relationships. Different tests, founded rather on positive law, have to be sought for the distinction.

The best criterion of the difference between a federal state and a confederation lies in the answer to the question whether or not citizens of the smaller state are directly affected by the enactments of the legislative organs of the comprising whole. In a federal state the central organs have direct rights and duties against and towards the individual citizens, whereas in a confederation the rights and duties vested in and imposed upon the organs of the comprising whole are against and towards the constituent parts, not against or towards its citizens. The American statesman Alexander Hamilton possessed a political flair which enabled him to appreciate this distinction. In the fifteenth of the famous articles in the *Federalist*, in which he urged the adoption of the American Constitution in such a powerful manner, he wrote:

'The great and radical vice in the construction of the existing Confederation is the principle of *legislation for states or governments*, in their corporate or collective capacities, and as contradistinguished from the *individuals*. . . . In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it. There was a time when we were told that breaches, by the states, of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union.'

That, writes Hamilton, sounds like wild talk now; it betrays a failure to appreciate the real motives of human conduct

and the causes of the origin of the State. Bitter experience had shown this: 'each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins.'[1] It is interesting to note, incidentally, that this would apply equally to the federal system of the old Dutch Republic.

So much for the distinction between a confederation and a federal state. That between a federation and a 'simple' or 'unitary' state is again not to be sought in the names given to the smaller parts, i.e. in conventional terms like 'states' or even 'provinces'. In Switzerland, which is undoubtedly a federal state, the members are not described as 'states', as they are in the U.S.A., but as 'cantons'. Two legal tests have to be applied in this case. First: in a federal state the associated states have power to make their own constitutions (*pouvoir constituant*); they can decide what form their organization shall take, within the framework of the whole system. In a simple or unitary state, however, the organization of each subordinate part is, in outline at all events, prescribed by the central legislature (as it is under the Local Government Acts).

Secondly: in a federation, the competence of the central legislature to make laws dealing with various *specified* matters is expressed in the constitution; in a simple or unitary state the powers of the central legislature are set out in a *general* enactment and the legislative powers of each local authority depend on the use of that legislative function by the central legislature. In the U.S.A., a federal state, Art. I, s. 8, of the Constitution provides: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises',

[1] *The Federalist*, in Everyman's Library, pp. 69, 71 and 73.

&c.; eighteen subjects are enumerated. The Constitution of the Netherlands, a simple or unitary state, enacts in Art. 112: 'Legislative power is exercised jointly by the King and the States General', and later in Art. 136, which deals with the legislative organs of the constituent parts: 'the management and control of *its own* affairs is left to the province and its council is empowered to make such by-laws as it considers necessary in the interests of the province.'

The criteria appear to be clearly defined, and the distinction is adequately drawn. At the same time, intermediate forms can be adopted. An example is afforded by the Weimar Constitution of the German Reich, of 1919. This document did not use the word 'states' to describe the smaller parts, but deliberately chose the word 'countries' (see Art. 2). 'The territory of the Reich', it said, 'consists of the domains of the countries of Germany' (*Das Reichsgebiet besteht aus den Gebieten der deutschen Länder*). And this was not due, as it was in the case of the Union of Utrecht, to political *naïveté*;[1] it was done deliberately, the draftsman being anxious to avoid the controversial term 'State'. It was done with the very object of not committing any one as regards the legal nature of the system under formation to either federation or decentralization. The draftsman, Prof. Hugo Preusz, favoured the unitary system; but centrifugal forces were at work.

When we apply the above tests to the legislation which ultimately emerged from the melting-pot, we first observe that the smaller parts are empowered to make their own constitutions (Art. 5). But this power is cut down by the Reich Constitution: the constitution of each country is to be both republican and democratic (Art. 17). 'Each country shall have a republican constitution. The representative

[1] See p. 77 *ante*.

assembly shall be elected by universal, equal, direct and secret ballot, the franchise extending to all male and female German nationals in accordance with the system of proportional representation. The Government of each country shall hold office subject to its enjoying the confidence of the popular assembly.'

In the second place, we find that the powers of the central legislature were set out in two ways. Art. 6 provided that the Reich should have exclusive legislative power in the sphere of foreign affairs and some seven other matters in all. Art. 7 conferred legislative power—this time without any qualifications—on the Reich in the matter of the Civil Code and some twenty other matters as well. Further, Arts. 10 and 11 gave the Reich optional power to lay down principles in a number of matters: 'the Reich *may* by way of legislation formulate principles as to the rights and duties of religious societies', &c. Art. 12 then provides that 'as long as and in so far as the Reich does not exercise its legislative powers, the countries retain the right to legislate. This, however, does not apply to the exclusive legislative power of the Reich.'

Thus we have in the Weimar Constitution an intermediate form, in both the respects distinguished; and it is not surprising that the question whether it gave the Reich a federal or a 'unitary' character was the subject of a good deal of controversy. But whichever way we look at it, the expressions 'sovereignty' and 'State' are of no assistance to us here.

2. THE BRITISH COMMONWEALTH OF NATIONS

What is the legal nature of the formation usually called 'the British Commonwealth of Nations'? This combination is even less susceptible than the others to classification, on dogmatic lines, as one of the recognized forms. A process

of development which is rapidly completing itself is here at work. The Dominions have developed from conquered territories into independent or autonomous corporate societies; the degree of autonomy, the question whether these societies are or are not completely 'sovereign', is still a matter of controversy. Here again we have evidence of the changes in meaning sustained by political expressions[1]: 'dominion status' does not mean, as the words literally indicate, the state of being a 'dominion', 'property', or 'possession' of the Mother Country, but a status which is, to all intents and purposes, one of complete independence.

The lesson taught by the American Rebellion was not without its effects in England. Burke expressed the position in eloquent terms: 'Who are you, that you should fret and rage, and bite the chains of nature? Nothing worse happens to you, than does to all nations who have extensive empire; and it happens in all the forms into which empire can be thrown. In large bodies the circulation of power must be less vigorous at the extremities. Nature has said it.'[2]

To put this in ordinary constitutional language, without metaphors: when territories are separated by the breadth of oceans from the central authority, it is likely that the functions of government, the organized provision for collective interests, will be less efficiently and less satisfactorily discharged than if the organs of government were on the spot. Whenever, owing to increased economic and cultural development, the demands for provision for collective needs in distant territories increase (and this, as we have seen, is inevitable)[3] it becomes less and less practicable to have these

[1] Some of the older Acts of Parliament speak of the 'dominion of Wales'.

[2] Burke, *Conciliation with America*, vol. ii, p. 56 et seq.

[3] See p. 46 *ante*.

satisfied by the central authority. And when education and similar forces have produced a sufficiency of local talent in those territories, the time is ripe for entrusting the discharge of legislative, executive, and judicial functions to their inhabitants. The task and the responsibility for its discharge go together.

Credit for having been the first to appreciate this, or at all events for being the first to express it, belongs to Lord Durham, who was sent out to Canada by the Home Government soon after riots had taken place there in 1837. In a famous *Report on the Affairs of British North America* he pointed out that unrest and confusion in Canada could never be stopped until responsible government was instituted. This could be effected without any change in the law, by simply instructing the Governor to entrust the task of government to people who enjoyed the confidence of the majority in the representative assembly, and making it clear to him that he was not to rely on the assistance of the Home Government in any dispute which did not directly concern relations with the Mother Country. With regard to the last point, he thought that the United Kingdom should settle the form of government, i.e. retain power as to the constitution; control trade with the Mother Country and the other colonies, and with foreign nations; and finally retain the right to dispose of Crown properties, a very important matter in a country like Canada.

Durham's proposals did not find immediate acceptance with the statesmen of the period,[1] for they appeared to them to be irreconcilable with the 'sovereignty' of the Mother Country. But they were put into practice by Lord Elgin, a son-in-law of Lord Durham, who became Governor of

[1] *The Times*, in a leading article on 18th October 1838, showed itself more than dubious about Durham's mission.

Canada in 1847 and who had the support, in pursuing this policy, of the British Government.

The system soon became a principle of British colonial policy. It was very soon extended to other parts of British North America; in about 1855 to New South Wales, Tasmania, South Australia, and New Zealand; in 1872 to the Cape Colony; in 1890 to the Transvaal and the Orange Free State.[1] It was also widened to cover those rights which Lord Durham had wished to reserve to the Home Government; one by one, the limitations on colonial power which he had thought desirable were found to be indefensible.

This development in the direction of ministerial responsibility and parliamentary government was followed by the institution of federal organization in the overseas dominions. In this case, the initiative was taken by the colonies themselves, the part played by the Mother Country being limited to giving effect, by Acts of Parliament, to the proposals drafted and decided upon by the overseas dominions. In the case of Canada this was done by the British North America Act, 1867. In Australia the process of development was slower. 'With no great neighbour to inspire distrust or stimulate ideas of national magnitude', says Lawrence Lowell[2] (Japan was not feared till later) 'local jealousies had more free play; and although there were no distinctions of race to keep the colonies apart, differences of economic policy had a similar effect.' However, they eventually proceeded to form themselves into a federation, and the result was the Commonwealth, the constitution of which is embodied in the Commonwealth

[1] For a general survey of this development, see Prof. A. B. Keith, *Responsible Government in the Dominions*, London, 1928.

[2] Lawrence Lowell, *The Government of England*, London and New York, 1914, vol. ii, p. 400 et seq.

of Australia Act, 1900. The development of the South African Commonwealth is still more remarkable. The bitter struggle with the Boer Republics ended with the Peace of Vereeniging in 1902, when those republics had been subjugated. But as soon after this as 1909 the Union of South Africa Act conferred complete self-government, creating the Union of South Africa.

The relation of the parts to the whole in the British Commonwealth has been the subject-matter of repeated discussions at Imperial Conferences, which are held at fairly short intervals. At the 1926 Imperial Conference the following formula was agreed upon to express the relation between Great Britain and her Dominions: 'They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'[1]

When we analyse this formula, it is apparent that the language of political theory has been avoided as much as possible and the attempt made simply to state facts. Neither the word 'State' nor the word 'sovereignty' occurs in it. It is therefore not possible, by referring to this text, to make a decisive statement about the political character of a Dominion, or about where 'sovereignty' resides as between parts and whole. The nature of the formula, one might say, is not juridical and dogmatic but empirical.

There is something to be said both for and against this. The advantage of it is the considerable elasticity and flexibility produced, which leaves plenty of room for growth

[1] A. B. Keith, *Speeches and Documents on the British Dominions*, 1918–31, p. 161.

and development. Its disadvantage is vagueness and uncertainty, giving opportunity for considerable difference of opinion as to the scope and effect of the formula.

Such difference of opinion was in fact manifested in due course. Does 'autonomous' mean the same thing as 'independent', 'free', and 'sovereign'? Do the freedom and complete equality of status spoken of imply a right of secession, a right to leave the 'Commonwealth of Nations'? Very different views are held, both among political theorists and practical politicians, on these questions, which go to the root of the legal character of the composite formation.

Prof. Smiddy, the first Irish ambassador to the U.S.A., contends that 'the only bond linking together the various nations of the British Commonwealth of Nations is the British Crown, or, one might say, the person of the King'. This would make the legal character of the British Commonwealth that of a *personal union*.[1]

Sir Cecil Hurst denies this:

'The British Empire is not a personal union. It is linked together by more than the actual fact that it has the same individual as monarch for all the communities of which it consists. The fact that they all have the same individual as monarch is not accidental. . . . It is the Crown and the common citizenship which flows from allegiance to the Crown which constitute the links which bind the Empire together.'

This would make the Empire a *real* union. In his book, *The Sovereignty of the Dominions*, published in 1929, Prof. Keith disputes both propositions. He holds that no limitation of internal autonomy can be founded on the common citizenship which flows from common allegiance to the

[1] Prof. Huart, in his treatise on *The Development of the British Empire*, also reached the conclusion that the Empire 'had become a personal union of independent states, with only the *person* of the head of the State in common'. See *Posthumous Works*, p. 140.

Crown; it would be entirely contrary to the traditions of English history to base limitations on citizenship of this kind. In his view, the Hanoverian succession made the inhabitants of Hanover 'natural-born British subjects'; but the domestic arrangements of the two countries were absolutely unaffected by the common citizenship of the peoples.[1] 'The obvious fact', writes Keith, 'is that the expressions used in the Report of the Imperial Conference of 1926 are descriptive of a state of affairs which may be the *outcome* of the present Constitution of the Empire, and may be the ideal to which it ought to aspire, but which is not its present constitution.' The Report of the 1926 Imperial Conference states that 'the principles of equality and similarity, appropriate to *status*, do not universally extend to *function*'; and it is now obvious, Keith considers, that this admission destroys the validity of the general formula under discussion. In other words, what the Report gives with its right hand it takes back with its left. And this, he goes on, was indeed inevitable. When the compilers of the Report had completed their general survey of the problem and proceeded to matters of detail, they found themselves confronted with formidable difficulties inherent in any attempt to apply their doctrine to concrete situations. The gist of the Report, when it ceases to deal with general principles, is the admission that 'the application of the doctrines thus enunciated must be the work of the future'. He does not, Keith says, mean this as adverse criticism. 'The issues raised are indeed fundamental, and the mere statement will avail to show how hard it is to suggest an ideal solution.'

There is nothing novel or out of the way about this, when looked at from the point of view of the formation and development of States. The Union of Utrecht of 1579 purported

[1] A. B. Keith, *The Sovereignty of the British Dominions*, 1929, p. 183.

to unite the Provinces of the Netherlands 'as if they were but a single province, in form and in substance'—but went on to provide that this was to be without prejudice to particular interests, special privileges and liberties, local customs, &c. The *general effect* was unity, but the *actual contents* of the document made the parts independent. Conversely, the Report of the Imperial Conference of 1926 has the general effect of declaring the independence of the parts, but its contents show their actual interdependence.

There was a good deal of difference of opinion and controversy about the formula employed by the Union of Utrecht; but owing to the actual interdependence of collective interests the trend of events favoured a reasonable organic unity. Owing to the geographical dispersion of the constituent parts the trend in the case of the British Commonwealth of Nations is likely to be towards increasing independence. The Statute of Westminster, 1931, at all events, is a step in this direction.

We may ask whether the tie has now become sufficiently loose to permit of any Dominion breaking away of its own accord. Some say it has; e.g. the present Premier of the Union of South Africa, General Hertzog, who bases his opinion that the right of *secession*, of resigning *proprio motu*, now exists on the resolutions passed at the 1926 Imperial Conference, especially the general formula then adopted.[1]

Keith most emphatically denies this in his book. It is clear, he says, that under the *existing* constitutional law of the Empire 'no Dominion has the power to secede of its own volition', and that no Dominion Act, no legislative measure passed by any Dominion, has the slightest power to sever

[1] General Hertzog was defeated in the Union Parliament in September 1939 on the question of South Africa's participation in the present war. On the other hand, Eire declared her neutrality.

the British connexion. It is an elementary principle of English law that a legislative body created for a definite purpose cannot validly enact any legislation which is outside the scope of the powers assigned it. Yet this is what would happen if a legislative measure passed by a Dominion legislature purported to sever the connexion with the Empire. In support of this Keith cites the preambles to all the Dominion constitutions, e.g. that to the British North America Act, of 1867; 'Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion *under the Crown of the United Kingdom of Great Britain and Ireland,* with a Constitution similar in principle to that of the United Kingdom . . .' It is legally impossible, he argues, for the Parliament of the Canadian Federation to destroy the essential purpose of its existence. And the same applies to the constitutions of the other Dominions.[1]

As a proposition in positive law, this is, indeed, a strong argument. For all that it is noteworthy that, in the course of a debate on the Government of Ireland Act, 1920, Mr. Bonar Law made a very different statement about Dominion status in reply to Mr. Asquith. 'There is not a man in this House', he said, 'and least of all my right honourable friend, who would not admit that the connexion of the Dominions with the Empire depends on themselves. If the self-governing Dominions, Australia, Canada, chose to-morrow to say "We will no longer make a part of the British Empire", we would not try to force them. Dominion Home Rule means the right to decide their own destinies.'

Quoting this passage, Keith[2] tries to cut down its meaning. He says that it is always dangerous to lay too much stress

[1] Keith, op. cit., p. 187 et seq.
[2] Ibid., p. 194.

on the language used by a politician in combating a proposal which he desires to make appear ridiculous, 'and Mr. Bonar Law's assertion is lacking in precision'.

Nevertheless it seems reasonably probable that the passage, cited as it is from a speech by a leading Conservative statesman, reflects the fairly generally accepted view held by responsible politicians, and also the state of public opinion.

In the field of jurisdiction the process of emancipation is likewise nearing completion. Two judgments of the Judicial Committee of the Privy Council, delivered on the 6th June 1935, are very significant.

The Judicial Committee of the Privy Council has in fact been the supreme judicial authority in colonial matters since 1833. In form, it is an advisory body (and thus the use of the word 'judgment' above is technically inaccurate, but is commonly used to describe the advice formally tendered to His Majesty), but in practice the Crown always acts upon the advice given in Colonial appeals; this had become a convention, a part of customary constitutional law. Now in some Dominions there has been a feeling in favour of abolishing the appeal to a supreme *British* tribunal. They no longer wish to be dependent on Great Britain as regards jurisdiction.

At the 1926 Imperial Conference the final result of the discussion of this topic was: 'that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire *primarily* affected.'[1] This was a somewhat vague formula, and capable of having different constructions put upon it. Only the general trend is clear: no judicial appeal will be *imposed* on any other part of the 'British Commonwealth of

[1] Ibid., p. 254.

Nations' against its express wishes. Should there be a strong feeling in favour of abolishing the right of appeal to a tribunal of the Mother Country, then there would be no question of resistance *à outrance*. Now there was really no question of any strong feeling in most of the Dominions. The Judicial Committee enjoyed considerable authority; it was constituted by the most learned and experienced lawyers, and, generally speaking, there was not very much objection to its jurisdiction. But in Ireland and South Africa objections were made.[1] In those two countries the feeling in favour of the greatest possible independence was strongest, and the feeling of unity with Great Britain weakest. In the case of South Africa there was the additional fact that the common law in that Dominion is Roman-Dutch law and the authority of the Judicial Committee consequently less than in the case of the other Dominions, where English common law is in force.[2] In *The Sovereignty of the British Dominions*, which appeared in 1929, Keith was able to conclude his chapter on 'Judicial Appeals' with the following passage:

'The retention of the appeal, therefore, rests in effect on the fact, that in the Dominions *as a whole*, there is no clear demand for its abolition, and that considerations of general policy render it unwise in the view of the British Government to concede hastily in form, at least, the Irish demand. It seems, however, that if the pressure continues the appeal must be renounced formally as it

[1] In *Hull & Co.* v. *M'Kenna* [1926] I.R. 402, P.C. Lord Haldane said: 'It is obvious that the Dominions may differ in a certain sense among themselves. In South Africa we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please.' Cf. Hector Hughes, K.C., *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations*, London, 1931, p. 24.

[2] Except in Quebec.

probably has been in practice. It is clearly inconsistent with autonomy, if that be pressed to its logical conclusion, and, while the other Dominions may not deem it wise or desirable thus to stress the point, they cannot be held to fetter the action of a Dominion that entertains a strong dislike to the court. The position is unfortunate.'

He favours a solution which would create a Court of Appeal for the whole Empire, its membership drawn from the various Dominions.[1] Thus, just as the Imperial Conference brings the forces of the various parts together for the purpose of foreign relations, for the *executive* function, so would this new 'final Court of Appeal' do the same as regards the *judicial* function.

It may be mentioned that the suggestion has not been carried out, and the course of development has taken another direction, namely, towards emancipation of the constituent parts from the appellate jurisdiction of the Mother Country's organs of justice.

In the two judgments of the 6th June 1935 referred to above, the Judicial Committee pursued the course of development to its logical conclusion and itself severed the connexion. One judgment concerned a matter of municipal law, a fishery rights dispute between two private individuals in the Irish Free State (as it was then called).[2] The appellants in that case sought to have a (majority) judgment of the High Court of the Irish Free State set aside by the Judicial Committee. Now an Act had been passed in the Irish Free State purporting to abolish the right

[1] Op. cit., p. 262. In the Report of the Imperial Conference of 1930 (par. 125) the institution of a Commonwealth Tribunal was suggested, the form to be that of 'an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth'. See Hughes, op. cit., p. 173.

[2] *Moore* v. *Attorney-General for Irish Free State* [1935] A.C. 484, P.C.

of appeal from I.F.S. courts to British appellate tribunals. The I.F.S. had therefore used its autonomous legislative power to abolish, of its own accord, the judicial appeal to an English organ of justice. The Judicial Committee had accordingly to decide whether this legislation was *intra vires* of the I.F.S., i.e. whether it conformed to the constitution of the British Empire as a whole. And the Committee *in fact* decided that withdrawal from the scope of the provisions as to judicial appeals was authorized by that constitution. This view was based on the Statute of Westminster, 1931. Before that enactment an I.F.S. Act to this effect would have been invalid by virtue of the Colonial Laws Validity Act, 1865. But the effect of the Statute of Westminster was to destroy the basis of this invalidity, as the Statute provided that no law and no provision of any law made by a Dominion Parliament should be void or inoperative on the ground that it was repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act.

It was likewise held on the same grounds in the other case, a Canadian appeal, that since the Statute of Westminster, 1931, Canada had the right to abolish, of its own volition, the right of appeal to the King in Council, which is in practice to the 'Judicial Committee'.

The view has since been expressed by Prof. Verzijl, in an article dealing with the Statute of Westminster which appeared in a Dutch legal journal, that the British Empire no longer enjoys constitutional unity and that time alone will show how long it will continue as a unit from the point of view of international law. I do not agree with this view, which would imply that the British Commonwealth

of Nations could no longer be classed as a composite State. This, I consider, exaggerates the position.

It is correct to say that the combination in question cannot be classified by reference to any of the current notions; it satisfies neither the requirements of a federal state nor those of a confederation.[1] No definite set of collective interests is anywhere set out. There is no formulation of the rights and obligations of the constituent parts in any document, such as the Union of Utrecht or the Articles of Confederation. The tie between the different members is not so much legal as psychological and traditional. It consists in similarity of political institutions, constitutional ideas and opinions; in likeness of aspirations, and, in connexion with these, in identity of a few, but a very important few, interests—namely those relating to peace and free and unrestricted international trade. But such a tie is no less real than one described in definite and legal terms. On the contrary: at the moment of trial, when the Mother Country was in peril, the tie proved to be far stronger than that uniting the parts of composite organisms whose constitution was carefully defined in legal terms, such as was that of the Austro-Hungarian State.

We see then that the British Commonwealth does not lend itself to classification under any of the headings recognized by constitutional dogma, and though it is, as a political organization, unique, yet this does not alter the fact that we are dealing here with a composite association for providing for collective interests, an association that is based on the idea of 'government by persuasion', not by

[1] In a report by the 'Committee on Inter-Imperial Relations' which was adopted by the 1926 Imperial Conference it is stated in terms that the British Empire 'considered as a whole, defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried'.

force, of self-determination for the constituent parts and free co-operation to promote common interests. This makes the system elastic and flexible—but it does not make it impotent. It is true, of course, that it is less capable of rapid decision and action[1] than it would be if its parts enjoyed less independence.

This has some effect on the point of view and methods of government favoured by the statesmen of the British Commonwealth of Nations. They do not seek to impose—and make no merit of imposing—their wills on others, regardless of those others' wishes, or to make themselves obeyed as much as possible, but prefer to employ methods of deliberation and persuasion. They are not partial to sharply defined, logical formulas, to be inexorably and ruthlessly applied, but prefer wide general statements which leave room to deal with unforeseen events as and when they occur. This, it is true, means that they are sometimes behind the times and occasionally fail to deal adequately with actualities. 'Never struggle with facts' is a sound maxim, but the danger is that if it is followed, 'facts' may be allowed to exist when they might have been prevented. But the tenacity of purpose displayed by the British in seeking to attain the objective, and their resolute and unflinching courage in times of need, do much to restore the damage done. (It has been said that in a war the British lose every battle except the last.) Thus the system and its methods have both advantages and disadvantages.

A difficult and indeed insoluble puzzle, from the point of view of jurisprudence, is raised by the question of the status of the various parts of the British Commonwealth of

[1] See as to these difficulties, especially in relation to foreign affairs, a treatise by Prof. Toynbee, *The Conduct of British Empire Foreign Relations since the Peace Settlement*, London, 1928.

Nations in the League of Nations. Each is a member of the League, being separately named, albeit in somewhat peculiar form, as witness the following extract:

'His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, Emperor of India [represented] by:

The Right Hon. David Lloyd George, M.P., First Lord of His Treasury and Prime Minister, etc., etc.;

And

for the Dominion of Canada by

The Honourable Charles Joseph Doherty, Minister of Justice, etc., etc.;

for the Commonwealth of Australia by

The Right Honourable William Morris Hughes, Attorney General and Prime Minister, etc.;

for the Union of South Africa by

General Botha and General Smuts;

for the Dominion of New Zealand by

The Right Honourable William Ferguson Massey, Minister of Labour and Prime Minister;

for India by

The Right Honourable Edwin Samuel Montagu, M.P., His Secretary of State for India, etc., etc.'

This separate membership was not achieved without difficulty. In the original draft covenant the Dominions were not separately named, and for some time the opinion was widely held, both in British and in other circles, that separate representation was not desirable. In Great Britain itself some thought it likely that separate representation would prejudice Imperial unity; while the other states objected that if it were granted the number of votes possessed by the British Empire would be unduly large. It was only by the application of continual pressure and the

exercise of all the ability and eloquence at their disposal that the experienced Dominion statesmen succeeded in achieving their object, being eventually supported by the British Government when it was apparent how strongly Smuts, Borden (the Canadian Premier), and Hughes (the Australian Premier) felt about it.[1] The Dominions thus succeeded in appearing in the Covenant as 'distinct members'. The decision does not, however, militate against the principle that the Empire, despite this 'distinct personality' of the Dominions, remains a unit: note the peculiar way in which they are mentioned in the document quoted.

We conclude that there is unity despite numbers in the British Commonwealth; but this does not alter the fact that the combination is a somewhat peculiar one, with, theoretically speaking, a dual nature. The British Empire has, *ex officio*, a seat on the Council, by virtue of Art. XIV of the Covenant of the League of Nations; but Canada has been an *elected* member of the Council. In 1919 Clemenceau, President Wilson, and Lloyd George formally conceded that this was possible, and the election actually took place in 1926. Canada even played a separate role when the minorities question was dealt with.

The King of England, in his capacity of head of the State in the British Empire, is therefore a party to the treaty; but that self-same king is represented in the Covenant of the League of Nations by each of the Dominions separately.

British politicians are not accustomed to trouble much about the logical coherence of an organism nor do the writings of English political theorists usually show much interest in this aspect of the matter. The impression one sometimes receives is that they pride themselves on this lack of logicality, or at all events flirt with it as if it were

[1] Keith, op. cit., p. 327 et seq.

a good thing. From a scientific point of view, this is, of course, not meritorious; it can be defended in the case before us only by pointing to the evolutionary nature of the system itself. This has undergone rapid development and for this reason the forms are still not sharply defined.

The same applies, to a very great extent, to the last composite association which remains to be analysed, the League of Nations.

3. THE LEAGUE OF NATIONS

What is the legal character of the most recent of composite organizations, the League of Nations? Is its structure juridically such that it can be classified under any of the known concepts of legal theory? Whenever this question is put, we are greeted, as Sir John Fischer Williams rightly observed in an interesting paper written for the International Law Association,[1] with a chorus of voices of varying authority, hastening to tell us what the League is *not*.

'The League is not a State, not a super-State.' This may be true but it is a purely negative statement; what is the League if it is not a State or a super-State? The official British commentary describes the League as being 'a living organism'. Here again we are not taken much farther. At the most the phrase means that the League of Nations possesses personality, is a legal *persona*; that it is a corporate body, with organs, with rights and duties, and property.

The above characteristics are indeed present. The League has an *executive*, the Council (Art. 4 of the Covenant); an *Assembly*, consisting of delegates of the members of the corporate body (Art. 3); it has its own officials, a Bureau,

[1] Sir John Fischer Williams, C.B.E., K.C., *The Status of the League of Nations in International Law*, Report of the 34th Conference, held at Vienna, 1926, p. 675 et seq.

a Secretariat (Art. 6, read with Art. 2); and diplomatic privilege is accorded to its organs (Art. 7).

The Swiss Government wrote to the Secretariat of the League, in a communication dated the 19th July 1921:

'it can be asserted that, consistently with the spirit if not the letter of the Covenant, the League of Nations can claim for itself *an international personality and juridical capacity*, and that consequently it has the right to *a status analogous to that of a State*. It follows that the League can claim the same independence vis-à-vis the administrative and judicial organs of Switzerland as *the other members of the international community*.'

This communication speaks of an 'analogous status' and of 'the other members of the international community'. How far can this analogy be carried, and up to what point can one speak of the League as a member, among other members, of the international community? Is this terminology correct? This is a point worth going into.

When we proceed to analyse the facts we do indeed find fundamental differences as well as common characteristics. The League, like separate states, is a corporate body, a composite whole composed of organs for performing public services, services which are to make organized provision for collective interests, and indeed for very important and extensive interests. But the fundamental interest which is to be provided for by this organization is of so different a character from that provided for by a state as to occasion a difference in principle between the nature and *modus operandi* of a state and the League. Whereas, as we have seen, the collective interest for which the State has first and foremost to provide is defence against other states, the consequence being that from the earliest times the public service of national defence occupied a leading position in the whole organization, the primary object of the League of

Nations is to abolish recourse to self-help by nation against nation. This truth cannot be denied. When we compare the international settlement made in 1919 with former great peace treaties, the difference stands out clear, and the purport of the new association is unmistakable.

At the first general peace settlement of the Western and Central European system of states, made by the Peace of Westphalia in 1648, the guiding principle was clearly the idea of creating a balance of power. It was the end of a well-defined phase of history. There was *not* to be a new world dominion such as the Austrian royal house, flushed with rapidly accumulated power, had threatened to impose upon the Western world. Authority was to be distributed between different organizations, recognized as valid just as different religious organizations were so recognized. In allotting their respective spheres to the various organized authorities it was sought to anticipate and prevent the acquisition of undue power by any one of them. The mighty power of Austria was deprived of its corner-stone; the independence of the Netherlands was recognized, and the collapse of Spain put an end to the threat which her power once had constituted. Later, when a new threat of temporal and spiritual dominion, in the shape of Louis XIV's France, menaced the Western World, the long and destructive war culminated in the Treaty of Utrecht of 1713, which actually gave expression to the principle of the balance of power: 'for the establishment and stabilization of the peace and quiet of Christendom by a just balance of power (*iusto potentiae equilibrio*)'. And when world dominion had to be liquidated for the third time, at the close of the Napoleonic period, the first Peace of Paris of the 30th May 1814, which may be considered as a preliminary to that concluded at the Congress of Vienna in 1815, declared in its preamble

'that the Allied Powers of the one part and the King of France of the other part cherish an equal desire to put an end to the continued disturbed condition of Europe and the unhappiness of nations by an enduring peace, based on a fair division of power between the Powers, ensuring permanency by its terms'.

By instituting the League of Nations, the Treaty of Versailles also sought to effect stabilization and the safeguarding of ordered conditions. But the conception was fundamentally different. No longer was the object sought to be achieved by a balance of power between the constituent parts, a method which had proved most unreliable; but rather peace was to be secured by the creation of an organized and comprehensive association, one which could be set in motion against the disturber of the existing order.[1]

The aim of the founders of the League, then, was to create a system which would oppose and suppress recourse to self-help among nations; and safety was no longer to be ensured by an artificial system of balance of power, but by making any breach of the peace in itself an unlawful act, to be dealt with by the *association* itself. A system of *collective* security was to replace the taking of measures for safety by

[1] The Treaty itself says:

'The High Contracting Parties,

In order to promote international co-operation and to *achieve international peace and security*

by the *acceptance of obligations not to resort to war*,

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understanding of international law as the actual rule of conduct among Governments,

and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another,

Agree to this Covenant of the League of Nations.'

each state individually, which had proved a complete failure.

Some important consequences follow from this. In several respects there are fundamental differences between the organization of the League of Nations and that of a state.

'Sovereignty' is a generally recognized characteristic of the State, and one of the incidents of sovereignty recognized by the Law of Nations was the right to declare war (*ius belli*). One sovereign state is equal in status to another, has the right to make its own laws and therefore to be judge in its own cause when it considers that its rights and interests are jeopardized. It is therefore entitled to declare war on another state and to give effect to its own opinion, by means of its organized forces, as to the scope of its rights and interests.

As against this, the avowed object of the League is to suppress all recourse to self-help, and consequently to oppose declaration of war between 'sovereign' states. The *ius belli* is restricted, to an important degree, by various provisions of the Covenant. Art. 12 imposes on all members of the League of Nations an obligation, if there should arise any dispute likely to lead to a rupture, not to resort to war immediately, but first to submit the dispute to judicial settlement or to inquiry by the Council of the League. Other provisions contain remedies to be applied when states fail to observe this rule (Art. 16, read together with Art. 15). The League is an association of States and is therefore not an entity of the same nature as those States: it is certainly not a confederation in the sense discussed earlier in this chapter. Confederations are distinct *personae* in international law; they send ambassadors to other *personae* (have the *ius legationis*) and conclude treaties in the same

way as other states. The object of a confederation is essentially the same as that of other composite formations of States. The United Provinces and the American Confederation declared war and concluded peace treaties and other treaties, and sent embassies, &c. But the object of the League of Nations differs essentially from this: it is to abolish aggression *qua* aggression, thus eradicating the dangers themselves; it sets out to *prohibit* recourse to self-help between nations. Hence we are confronted with an association which is *sui generis*, being essentially of a different character.

The relationship is as follows: there is some similarity of object between the League and any state if one uses the word 'object' in the sense of general, ultimate object, i.e. the promotion and securing of the conditions of human life and human development, which means using it in the sense of the Aristotelian formula discussed in Chapter III (p. 70 *ante*): "*γινομένη μὲν οὖν τοῦ ζῆν ἕνεκεν, οὖσα δὲ τοῦ εὖ ζῆν.*" This general, ultimate purpose is, in the last resort, common to all organizations formed to make provision for collective interests, be they states, county councils and other local authorities, or the League of Nations. It is as unpractical and inaccurate to classify the League of Nations as a sort of 'state', a 'super-state', merely because Aristotle's formula can be and is correctly applied to it, as it would be to describe one's county, rural district, borough, or parish as a 'sub-state'.

If on the other hand we do not use the term 'object' as meaning general, ultimate object, but as meaning immediate object, i.e. the organization of forces for the purpose of promoting the realization of the ultimate object, then the various bodies at once classify themselves according to which particular collective interests they are intended to

provide for, and we then clearly discern the differences between a composite state and the League of Nations. The League of Nations is a corporate body formed for the purpose of pursuing a particular object, that of securing safety by ensuring the preservation of peace, and has its own remedies and penal sanctions, which differ from those available to a state.

The actual work of the League is, however, bound to affect the functioning of the State. It may even be said that as the functioning of the League improves, the State will have to make radical changes in various respects in its *modus operandi*. While the State's object is promoted when it raises armed forces of its own and makes them as efficient as possible, this can but *hinder* the achievement of the object of the League of Nations. For it is obvious that a state which has to rely on its own resources must maintain the strongest possible armed forces; while the League on the other hand is out to prevent the maintenance of strong armed forces. This is expressly recognized by Art. 8 of the Covenant of the League of Nations, where we read that the members of the League recognize that the maintenance of peace *demands* a reduction in national armaments.

There are further consequences. The policy of a 'sovereign', self-sufficient state must needs aim at keeping outside conflicts between other independent states, with the object of remaining 'neutral', i.e. seeing that its own armed forces, its own territory, and its own economic forces are not affected by the conflict. Careful elaboration and maintenance of the institution of neutrality is well within the scope of pre-League of Nations International Law. The League, on the other hand, is bound to seek to unite all the forces of its members against the disturber of the peace, and to make use of all the means which its members can place at its

disposal, their armed forces, their territory, and their economic power. This is indeed contemplated by Art. 16. When a member state resorts to war in disregard of the obligations imposed by Arts. 12, 13, and 15, it is deemed *ipso facto* to have committed an act of war against the other members. These engage themselves forthwith to sever all commercial and financial relations and prohibit intercourse between their nationals and those of the covenant-breaking state. Art. 16 also makes it the duty of the Council to recommend to the several Governments what effective military, naval, and air forces they should severally contribute to the armed forces to be used to protect the covenants of the League. Further, members of the League are to take the necessary steps to facilitate the passage of troops across the territory of any member taking part in joint operations to compel fulfilment of the undertakings of the League.

This represents a complete inversion of the right of neutrality known to International Law. So close is the connexion between the various principles of the system that failure to observe Art. 8 will paralyse the whole functioning. In the recent Italo-Abyssinian conflict, in which Italy's violation of the Pact was established beyond all question and unanimously agreed upon, economic sanctions were indeed applied against the aggressor. But nothing else was done under Art. 16.

In view of the tremendous strengths of the independent armed forces maintained by the Great Powers, the action of the Council of the League of Nations in declining the responsibility of insisting on strict performance of the obligations contained in Art. 16 is easily intelligible. There was grave danger that in the circumstances execution of its provisions by the League would have assumed the shape of

a terrible war. It would, indeed, be a contradiction in terms if the system designed to secure peace should automatically increase warfare to a gigantic scale. The League's action then is easily intelligible; but at the same time it proves that the non-observance of Art. 8 made the system wellnigh unworkable.

The mistake was the omission to see that the *modus operandi* of member states should conform to the new system. It was considered that the old methods could be persevered in as if nothing had happened. This is a not infrequent error: it has been made again and again, in theory and in practice. The best-known example in political theory is Rousseau's conception of the State, discussed above. Rousseau thought he had discovered 'a form of association which defends and protects with its combined forces the person and goods of each member, and by which every one, uniting with all, yet *obeys himself only, and remains as free as before*'. But in the last words we are confronted with a tragic blunder. Organization and corporate association imply restriction; he who joins a corporate society never 'remains as free as before': 'Toujours d'un droit qui naît, meurt une liberté'. And if we turn to practical examples, Dutch history has shown how the Union of 1579, while purporting to leave the Provinces their full rights and liberties, did no such thing, despite Grotius' statement that no modification of sovereignty had been effected. Again, when in 1777 the American colonies, having destroyed the unifying authority of the Mother Country, formed a new corporate association with the express object of 'assisting one another against all violence done or attacks made against them, or any of them, in the matter of religion, sovereignty, commerce on any pretext whatsoever', they expressly declared that '*each state* should preserve its sovereignty,

liberty, and independence'. This was another mistake, as Alexander Hamilton was quick to perceive, a mistake which he helped to remedy with indefatigable and inspired energy, far more rapidly than happened in the case of the Dutch Federal Republic.

When the Dutch Republic was on the decline, one Simon van Slingelandt ascribed the trouble to the great measure of independence enjoyed by its constituent members. He pointed out that no association could exist when every member of the association was master in his own house and free to comply or not to comply with the resolutions passed. Applying this to the *societas* of the League of Nations, we lay our finger on the root of the trouble. It is the lack of binding force of its resolutions, and the almost unlimited freedom enjoyed by every member to oppose resolutions and to hinder if not prevent their being carried out when they have at last obtained assent, which is undermining the League. There is a good deal of talk about the desirability of revising the Covenant, of the need for making its provisions fit actual facts. It is difficult to see how the system can be made to work properly unless the defect we have referred to be remedied. It will be necessary to achieve the position that resolutions shall bind as regards the collective interest to promote which the association was formed, namely the suppression of recourse to self-help among states. Subject to this, the greatest possible freedom must be left for the pursuit of national ambitions; the 'sovereignty'—to use the time-honoured expression—of the various states must in all other respects be preserved as much as is possible. But if in this vital matter of common interest, the suppression of recourse to self-help among nations, it be not possible to achieve enforceability of decisions by compulsory means, the system itself will do more harm than good.

What endangers the League of Nations is the amount of uncertainty as to the scope of the obligations undertaken by members in the event of part of the obligation not being performed. The performance of the obligations imposed by Art. 16 undoubtedly presupposes performance of those contained in Art. 8, as was indeed expressly provided in the Geneva Protocol. But this is not stated explicitly; and uncertainty as to such important obligations, concerning matters which call for quick decision in a highly tense atmosphere, is fatal. The absolute right of neutrality was better than this.

The system of collective security needs a system of collective decision and collective force to compel observance. Freedom to observe or not to observe cannot be reconciled with it; and, of course, one-sided enforcement still less. The policy of the member states will have to take a turn in this direction. For here we have the new form of expression by which Dante's lofty sentiment,[1] that the fulfilment of man's highest aim demands peace among nations, can alone be realized. Certainly it cannot through the form of some world-wide dominion: that form has shown itself to be a vision, a dream, an illusion, though one which is apt to be cherished again and again, and to which national leaders once more appear to be ready to succumb. But what, after all, *is* a nation? It is to this question that we must now turn.

[1] See p. 60 *ante*.

CHAPTER VII

STATE AND NATION

1. THE CONCEPT OF NATIONHOOD: NATIONAL CHARACTER

FOR several reasons, the problem of what really constitutes a nation is one of the utmost importance for political science. The ever-increasing response to the appeal made by the principle of nationality has added to this importance. Since European frontiers were settled by the Congress of Vienna, the relationship of 'state' to 'nation' has been in a sense inverted. For the purposes of political science it is no longer accurate to describe a 'nation' as a human group organized in a particular state under a particular government. Instead of the organized system being the test of nationhood, nationhood has now itself become the test of the organized system, organization being on the basis of nationality. Thus the great international association was not christened 'Société des *États*' but 'Société des *Nations*', League of *Nations*. When frontiers were settled at the Treaty of Versailles, the principle of nationality, the idea that the State should be based on the 'nation', was adopted as the governing principle. Not that it was accepted in an unqualified manner and with complete knowledge of all the facts. On the contrary, blunders were committed, and sacrifices made to other interests, more especially strategic and economic interests. 'The right which all peoples, whether small or great, have to the enjoyment of full security and free economic development' may indeed find itself in conflict with the principle of nationality in its purest form. This has given rise to some difficult, indeed

wellnigh insoluble, problems. I will revert to it when discussing the problem of minorities.

But this inversion of the relationship between state and nation has made the latter concept more difficult to determine. There are linguistic difficulties about it in most languages: Dr. Friedrich Hertz in his *Wesen und Werden der Nation*[1] draws attention to the important modifications of meaning undergone by the word *natio*.[2] We may say, however, that at all events the term means a human group which is distinct from other similar groups. A 'nation' connotes a large group of human beings who, as compared with other groups, enjoy similar circumstances, and may be said to denote a group of persons of common sympathies occupying a particular territory, a *patrie*, *Heimat*, 'country'.

If now we ask what is the essence of a nation, the question arises, is it a matter of fellow feeling? Rothenbücher, in his essay *Über das Wesen des Geschichtlichen und die gesellschaftlichen Gebilde*, contends that it is. His view is that consciousness is not a necessary element; a nation may exist, and that for a long time, without attaining consciousness of itself. By 'nation' is meant a number of people who have particular mental characteristics in common, regardless of whether the individual member is conscious of this community of characteristics.

I find it difficult to accept this. Granted that Rothenbücher's general standpoint is sound, that a 'nation' must be considered to be 'a social phenomenon' bearing the marks of 'the historical', i.e. of past events, yet this definition does not wholly fit the case. True, not every individual member of a nation is likely to be wholly conscious of the

[1] See the collection of monographs published by the *Jahrbuch für Soziologie* under *Nation und Nationalität*, Karlsruhe, 1927.

[2] Op. cit., p. 3 et seq.

common traits; far from it. But the distinguishing characteristic of a 'nation', as it is now recognized as a basis for the demarcation of frontiers, is surely this: that the members of the nation, the individuals composing that human group, shall in a general way be conscious of the fact that they desire to organize themselves as an independent group; that they are conscious of the feeling of solidarity with the other members of their group; and that they object to living in a single rigid association, under one general organization or at all events in one single state, together with other human groups, other nations.

The facts bear this out. The inhabitants of Northern Italy who at the beginning of the nineteenth century lived under Austrian rule, who were subject to the Austrian legal organization and were incorporated as part of the Austrian state, were conscious of the feeling that they did not desire this, but wanted to form (and thought it their right to do so) a single nation and live together in one organized state with their fellow Italians, i.e. with those who, though living under a different political organization, were regarded as forming with the Northern Italians one organically connected group. The inhabitants of Poland, again, who lived at that time partly under the Russian organized system, partly under that of Prussia, and partly under that of Austria, and had been incorporated in those states, were conscious of the fact that they did not desire this, but wanted to form, with their fellow nationals (and thought it their right to do so) a single political group, under a single organized system, i.e. a Polish state. It was because of this very consciousness that they all engaged in a struggle, made efforts, ran risks, and made considerable personal sacrifices to put an end to the existing organized systems, considered 'foreign' by them, and to establish new systems.

It is due to the facts that at a certain stage of cultural development this consciousness manifests itself and these desires are formed that the problem becomes a live one. It is, however, hardly ever possible to say in any given case when exactly a consciousness of this sort arises. One might even say that it is never possible. For even in a case in which it may at first sight seem possible, further consideration will show us that we were wrong. In a case like that of the Declaration of Independence by the North American colonists one would be tempted to say: '*that* clearly was the hour when the American nation was born'. But conscious desire must have been formed before then, and formed slowly; the Declaration was rather its outward manifestation at a particular moment, and it is pertinent to mention that the Declaration was issued by the signatories as 'representatives of the United States of America, in general Congress assembled, in the name and by authority of *the* good people of these colonies'. The use here of the definite article shows that the nation is deemed to be already in existence.

What is it that gives rise to this consciousness of solidarity and the accompanying desire to live together in one political association? In a famous speech, Ernest Renan answered this question by mentioning 'the consciousness of having done great things together and the common desire to do other great things'.[1] This indeed gives us some of the most important psychical factors, but it would be treating the matter as all too simple to consider these the vital elements. The binding element is not only what great things have been performed and achieved by a group, but also what it has suffered and gone through. Group life is not merely a matter of common activity and ambition, but also of common fate

[1] '*Qu'est-ce qu'une Nation?*' 1882.

and suffering, of dangers shared as well as successes jointly won. It would be difficult to say whether the Spanish tyranny of the sixteenth century with the misery and suffering it inflicted did not do more to unite the people of the Netherlands than their 'golden age' of the seventeenth century; or, again, which was more important in this respect, the Napoleonic oppression or the 1813 liberation. All one can say is that in the lives of most, perhaps of all nations certain combinations of events so deeply affect their psychical make-up that they remain permanently engraved in the group consciousness, in the 'national soul', and give the nation's thoughts and ambitions a particular bent. The Eighty Years' War with Spain, and the struggle for liberty of conscience, made the tradition of liberty, spiritual liberty, very strong in the Netherlands. The government of the day has to bear this in mind, for any measure which may seem, however remotely, to affect freedom of religion and freedom of thought, is bound to arouse opposition.

For the Swiss, the binding element is the memory of the struggle against their Habsburg feudal lords, and later against Charles the Bold. The names of Morgarten, Sempach, Laupen, and Nancy, the battles at which they achieved glorious victories, fire the imagination.

In Prussia the consciousness of unity is in large measure to be ascribed to the heroic struggle of Frederic the Great against a coalition of hostile states, with all its vicissitudes, intensifying group life by the great sacrifices demanded and the great national glory achieved. The tradition of a rigidly organized and conscientious public service, and of a military organization with iron discipline, the two instruments by which the great victories in that struggle for existence were achieved under the genius of Frederic, is very strong in Prussia, and has left its mark on the whole

national mentality as well as on the form taken by these particular organizations.

Among the English, the struggle against absolute monarchy and the wresting of Magna Carta from the King, which was the origin of all free political institutions, is deeply graven in the national consciousness.

The French nation's most tremendous and vivid experience was undoubtedly the Revolution, with all its effects, soul-stirring and emancipating on the one hand, destructive on the other; and the 'Marseillaise' is still the national anthem. But its history also includes that of the organizing function of the monarchy, and the brilliant figures of St. Louis and of Joan of Arc are lasting memories; while the spell-binding feats of Napoleon and his national armies, his military glory and that of his legislation, stimulate to a deepened sense of life. Hence the French have a strong republican tradition but also a powerful military and administrative tradition.

We see then that besides common ideals and ambitions, common disasters and disappointments, marking the limits of the group's ken, all in the last resort contribute to create a sense of fellowship, and to form a nation.

Thus the formation of a nation is a psychological phenomenon. The idea that nationhood depends on common ancestry, unity of 'blood' (as some people, who entertain a certain preference for archaic and mythological terminology, express it) is untenable. Common ancestry is admittedly implied by the word *natio*, in its etymological meaning. But if one insists on common ancestry and race as a necessary element in nationality, there is now no such thing as a 'nation' in all Europe, indeed in almost the whole world. For fusion has taken place everywhere, as a consequence of migration, conquest, religious persecution, the exiling of

large groups belonging to the same race but of a different religious persuasion; or emigration, due to economic causes or to commercial prosperity. The American 'nation' is composed of elements the racial origins of which could never be traced; yet it forms a close unit, with a strong sense of nationality. The same applies, to a greater or lesser degree, to some of the most firmly united nations, the British, the French, the German, the Swiss, and the Dutch. Nor is a common language indispensable, as witness the Swiss nation.

The racial or 'blood' theory is not a useful guide to the solution of the problem of the formation of nations. It owes much of its popularity, as Le Fur rightly contended,[1] to the idea usually associated with it, that of superiority supposed to be peculiar to a particular race. But this feeling of superiority of one's own nation cannot be explained in terms of any racial or blood theory. It is a very widespread phenomenon and has nothing to do with any 'theory' about the nation and the idea of 'nationhood',

[1] Le Fur, *Races, Nationalités, États*, Paris, 1922, p. 7. Whether the racial theory should be considered a specifically German theory, or whether the fact that a Frenchman, Count De Gobineau, was the first to develop it as a systematic doctrine makes it French, is of no scientific importance. In this connexion I think it fair to say that Ziegler is right in saying, in *Die Moderne Nation*, Tübingen, 1931, p. 39, that it must in no way be considered *the* doctrine generally accepted in Germany. At all events, not if one takes German science over a long period. See also Hermann Heller, *Allgemeine Staatslehre*, Leiden, 1934, p. 148 et seq. In the Nuremberg Laws of 15th September 1935 the 'blood' theory is adopted as a governing principle: see the preamble to the Law for the Protection of German Blood and German Honour: 'Convinced that purity of German blood is the *main consideration affecting the continued existence of the German nation*, and inspired by the inflexible determination to preserve the German nation for ever . . .' In practice, however, the application of the principle is purely *anti*-Semitic: Jewish blood is not to mix with German and *kindred* (*anverwandt*) blood; the provision is utterly vague.

but is just that of over-assessing the importance and value of the circle, be it large or small, to which one happens to belong, in comparison with other circles: one's own family, one's own coterie or clique, one's own social or sports club is made out to be better and worthier than others. A certain breadth of vision and skill in objective analysis, or in other words a higher development and culture, are necessary if we are to get anywhere near the real relationship. Love is blind, it is said; but attempts may at least be made to open our eyes to the truth.[1]

One special cause of the common ambitions and experiences we have mentioned may be the fact that the human group has been directed by a particular system of government for a long time and has had its common destinies largely determined by that system. Among primitive peoples whose conscious life has not developed to any great extent, it is less difficult to form new associations, and a new unit may be produced by the amalgamation of two or more political groups whenever geographical and economic considerations make for common interests for which the larger system is better able to provide.

But as political development progresses, there comes a time when the force of common experiences, memories, and ambitions creates so strong a link that the incorporation of the particular human group in another composite unit is something that strikes its members as an intolerable threat

[1] Conversely, one may set out deliberately to destroy all sense of proportion. Thus Hitler says, in *Mein Kampf*: 'In Science, too, the racial State should see a means to foster national pride. Not only World History, but the whole history of culture must be taught from this point of view. An inventor must not only appear great as inventor, but greater still as a member of the national community' (See *The Racial Conception of the World*, by Adolf Hitler, with a foreword by Sir Charles Grant Robertson; 'Friends of Europe' Publications, No. 37).

to its highly prized spiritual possessions. When that stage is reached, incorporation in another system no longer results in the formation of a new common life shared with those living under the same system; it engenders, on the contrary, hatred and bitterness, and occasions spiritual disunity instead of unity. It was too late in the day when Russia, Prussia, and Austria attempted to assimilate those parts of the Polish nation which they annexed and incorporated in their systems; nor could Austria succeed in the case of the Czechs, any more than formerly in the case of the Northern Italians. In the days when the system itself was exposed to the greatest danger, the period of the Great War, these groups did not feel themselves one with the organized authority, but were consciously in hostile opposition to it.

The stage of fellow feeling is not reached at the same time everywhere. There are ancient nations and young nations. But the time comes to every nation when large sections of the group begin to live a more conscious life: reaching a higher stage of development, they become conscious of their common destiny, aware of their common struggles and sufferings, their common victories and defeats, their common ambition; in fine, of their history, even if it be only in outline; and they see a common future before them.

Their view of the task which confronts them is affected to a considerable extent by ideas borrowed from the glorious periods of the national history, periods of great tension when life was at its fullest. These ideas do not, as a rule, conform to the actual facts; memory embellishes, and creates myths which stimulate and feed the popular imagination. What is so tragic is that myths of this kind are capable of influencing imagination and affecting the objects the State aims at in a way which leads to the pursuit of emotional and ill-

balanced policies. The myth of the world-wide *Imperium Romanum* and that of the heroic and warlike Teutonic tribesmen created objects which, as explained above,[1] required a special organization of resources for their attainment. This organization was such that the states in which it prevailed were looked on by their fellow states as dangerous and untrustworthy. What is more, the myths were out of harmony with the idea of a *community* of states, a 'comity of nations'. The *Imperium Romanum* meant *world* power and domination; the heroic and warlike tribesmen, at an earlier stage of development, recognized no other peoples as their equals. The might of the sword, according to this view, is the only measure of a nation's merit and importance, and armed conflict is therefore necessary to establish merit and importance.

Psychologically, it stands to reason that nations subjected to severe reverses and bitter disappointments are particularly susceptible to such myths. A feeling of collective inferiority sets up a striving for compensation by means of ideas of superiority. In such circumstances, a man of personality who is a master of the art of 'playing on the keyboard of national consciousness' may exploit popular imagination and attain great power by personifying the ambition in question. The Leader then becomes the 'nation personified'.

The danger behind all this is that reality is sometimes quite irreconcilable with the myth, and the result is intolerable tension and overstrain. Mussolini may well say: 'We have created a myth. The myth is a creed, a passion. It is unnecessary that the myth should be a reality. It is a practical reality, because it is a stimulus, a hope, belief, and courage. Our myth is the nation, our creed is the greatness

[1] p. 54 et seq. *ante*.

of the nation.' But this 'practical reality' is apt to find itself opposed by other very 'practical realities'. It so happens that the system of states and their boundaries has, in the course of history, acquired a certain stability, as was pointed out above.[1] Aspiration to world dominion found itself baulked, when territorial states had been formed, by a tendency in favour of a balance of power. Over a hundred years ago the Dutch statesman Thorbecke wrote:

'Political equilibrium was based on the idea that no state could attempt to suppress another state without automatically setting in motion forces which would ward off the danger. . . . Self-interest of one or several Powers could not be allowed to triumph at the expense of others. . . . Grouping was therefore to be so arranged as to ensure that any power which tried to assert itself in this way would find itself confronted by a natural combination of opposing interests, which would form a bulwark of liberty'.

A large proportion of a nation may succumb to the myth, but the process may not affect other nations. In fact, the serious threats which the myth constitutes cause other nations to react by setting bounds to the aspiration of self-aggrandisement. Hence policy which is inspired by the myth is apt to lead to disastrous results.

Nations differ in the degree to which they are susceptible to appeals to the imagination. They are differently predisposed. What applies to individuals also applies to nations in this case: a number of different individuals will often, though not by any means always, react to similar circumstances by similar conduct.

Is it right to speak of a national character? It is certainly usual to do so. Differences in national character have been empirically observed and noticed, in somewhat rough-and-ready fashion; political theorists have taken cognizance of

[1] p. 191 et seq.

this from the earliest times.[1] In Aristotle's works the view is expressed that there is some causal connexion between national character and political institutions and behaviour. We can understand his view from the discussion on the institution of monarchy in the *Politics* (Book III, ch. 9). He very rightly distinguishes between different forms of monarchy. In some states the institution does not by any means imply supreme authority in everything; it includes official legal authority and executive power, which expands into command of the army in time of war only and then carries with it the right to inflict capital punishment. But in the case of other nations monarchy means something quite different, namely absolute monarchy, a permanent hereditary 'tyranny' as in the cases of the 'Barbarians'. 'For Barbarians, being more servile in character than Hellenes, and Asiatics than Europeans, do not rebel against a despotic government.'

This is another example of Aristotle's keen perception and talent for analysis. People of low energy and high emotionality, people with but little desire to take an active part in the affairs of the world and a strong urge to lose themselves amid their own private feelings, and people of the apathetic and dull type, careless, lazy, and indifferent (the psychological types known as 'apathetic' and 'melancholic'), are more disposed to accept despotic rule than people of the 'sanguine', passionate, or 'phlegmatic' types, who are naturally energetic and active, courageous and vivacious.

Modern authors, too, favour the opinion that there is a

[1] Also works not specifically concerned with political science, e.g. Hume's Essays, No. XXI, *Of National Characters*, Essays, vol. i, p. 214 of the 1793 edition. Likewise Kant in his *Anthropologie in pragmatischer Hinsicht*, 5th ed., published by Vorländer at Leipzig, 1922, p. 261 et seq., makes interesting observations on the 'Character des Volkes' of the Germans, French, Italians, and English.

close connexion between national character and form of government. An example is afforded by Bryce who, in his interesting comparative treatise *The Roman Empire and the British Empire in India*, asks to what both owe their success. 'Both triumphed by force of character', is his answer.[1] Iron will and determination, mental energy and a sense of continuity, these are the important factors which produced success. We may add further, a sense of reality, a certain detachment in judging of facts and situations, moderation in government and governmental institutions, non-interference in the field of operation of groups connected with the system. High emotionality which makes for inadequate control of the imagination is a disadvantage when it comes to setting up a state, creating governmental institutions, and operating them. The more phlegmatic type is better equipped for the purpose of forming and organizing a state; and moreover, persistence and the capacity for indefatigable pursuit of objects decided upon make for considered judgement and diminish the risk of hasty decision; a speculative policy makes no appeal at all to this type of mind.

Very little has yet been done in this field of inquiry. There has been nothing that can be called a careful and precise analytical investigation. There are, it is true, a number of monographs on the subject. In particular, there is an interesting treatise by Dr. Elias Hurwicz, *Die Seelen der Völker, Ihre Eigenarten und Bedeutung im Völkerleben* ('The minds of peoples, their special characteristics and significance in national life'), with the sub-title *Ideen zu einer Völkerpsychologie* ('Some suggestions for a national psychology').[2] This author's fundamental idea is that 'National psychology is the study of the *special mental characteristics of*

[1] Bryce, *Studies in History and Jurisprudence*, New York and London, 1901, Part I, p. 49.

[2] Gotha, 1920.

nations', and in consequence he regards 'national psychology' as a special department of study, a sub-species of 'Special' Psychology. The idea is sound; but Hurwicz gets no farther than 'suggestions' when dealing with 'national psychology'. Nevertheless, his observations serve to give us our bearings: their value is heuristic. His analyses of the English and Russian characters, for instance, are interesting as a study in contrasts. In the English character, the 'phlegmatic' psychological type very clearly predominates: the Englishman is preponderatingly energetic, only slightly emotional, and has a strong sense of continuity and instinctive obedience. In the Russian character the nervous temperament is to the fore: the Russian is preponderatingly emotional, only slightly energetic, and possesses comparatively little sense of continuity, or at all events his sense of it is imperfect.[1]

We are still in all this a long way from being able to establish cause and effect; we can mention only some signs indicating that an explanation will become possible.

I would emphasize two points at this stage, at the same time warning writers against drawing certain inferences which they may feel inclined to draw. First I would point out that when dealing with these differences in temperament by reference to the relative preponderance of the three basic types—the motor type, sensory type, and

[1] Cp. p. 43 et seq. and p. 66 et seq. 'The silent enjoyment so dear to every Englishman, of struggling against something, persisting in something and not giving in', compared with ' "Above all things, the casting of moderation to the winds" is the way in which Dostoevsky described a fundamental trait in the Russian character, in his *Diary of a Writer*; he speaks of "the need to go right up to the edge of an abyss, in the throes of passion; to gaze into its depth and in some cases, and not infrequent cases, to throw oneself into it". I believe that the greatest need of the Russian people is the constant and insatiable need for suffering. This need for suffering has been its disease, it seems, from time immemorial. The Russian people enjoys suffering.'

delayed reaction type—we must not think of differences in value, at all events in the absolute sense. We cannot say the 'phlegmatic' type is *higher*, as such, has greater value absolutely, than the 'sanguine' type, the passionate type, the nervous type, or the sentimental type. At the most we can say that the phlegmatic type is of greater value *for certain purposes*; for other purposes or activities other types are of higher value in the sense of being better predisposed.

Thus the *nervous* temperament is far better predisposed than the phlegmatic temperament for artistic achievement and activity, for the creation of beauty, in view of the far greater imaginativeness which is its corollary. It has more emotional content and less restraint; it favours variety and sudden and at the same time fascinating changes in consciousness, which are themselves a result of its possessing little sense of continuity. Investigation has shown that the nervous type preponderates among artists. The *phlegmatic* temperament, on the other hand, predisposes to determined, patient, deliberately pursued labour in agriculture and industry; it is also valuable for scientific work in so far as that consists in the collecting of material, objective analysis, and correlation of phenomena and data. Investigators of this type include Locke, Kant, Hume, John Stuart Mill, Franklin, and Gibbon.

This does not mean that scientific inquiry can never be successfully conducted by people of nervous temperament; such a conclusion is unwarrantable. Thanks to their vivid imagination, they may conceive some new and original idea in a flash. (For an example we may take Rousseau, whose disposition was nervous and sentimental: his *Contrat Social* was written at high tension). This enables them sometimes to throw an entirely new light on an old problem.

For similar reasons, a sense of continuity is not, generally

speaking, a *sine qua non* of important achievement; it may help or it may hinder; it gives rise to determination, persistence, and tenacity but also to stagnation and adherence to dry routine. Conversely, a poor sense of continuity and a greater degree of openmindedness facilitate change of outlook, apprehension of facts, taking in a new situation at a glance, and rapid adaptation to the needs of the moment; but they also mean a tendency to abandon plans on slight provocation and to change objectives and methods, and they make for fickleness. We get a better understanding of the facts if we bear this in mind.

My second point is this: when we speak of a *national* character, we refer only to a *majority* who conform to a particular type; we do not mean that *every* individual member of the nation is of that type.[1] Not every Russian belongs to the nervous category; there are calm, deliberative Russians just as there are highly strung Englishmen and Dutchmen; some Englishmen, again, are fickle, and of the sensory type. The celebrated English poet Lord Byron would be classed, on analysis, as nervous. The difference (between nations) is therefore relative, but this relative difference does predispose them, to a considerable degree, to political conduct of a particular kind and to the use of particular political methods.

Here again it is difficult, when we are in the field of political science, and are dealing with the formation and reformation of states, to discuss in absolute terms the significance of national character. Both the English and the Russian nations have been successful in the matter of forming states, in the sense that they have managed to form very considerable state communities, though in different ways.

[1] Hume warns against this common error in his Essay *Of National Characters*, op. cit., p. 224 et seq.

The Russians have done more in the way of assimilating primitive peoples, in *Einfühlung*, in *adapting* surrounding nations to their own political institutions; whilst the Anglo-Saxons have triumphed by self-expansion. Their practice has been to oust other peoples and, when that was not possible, to *dominate* them by their superior methods of government and administrative technique, by their tenacity of purpose, inflexible determination, relative impartiality, and sense of justice. The English have never assimilated themselves to coloured races but have always kept strictly aloof from native populations. They have limited themselves to governing them; but they have governed them with a certain detached moderation and objectivity.

This difference in methods accords with the differences in national characters already discussed: the low sense of continuity, greater emotionality and imagination of the Russian people, the strong sense of continuity, slight degree of emotionality and more limited imagination of the British. The Russian's extensive imagination enables him to make himself at home among primitive people; a penchant for sociability, unlimited loquacity, and love of argument are usually considered characteristic of the Russian. He could also, it is true, be savage and cruel to these primitive peoples when under stress of emotion; but they in fact thoroughly appreciate this, as establishing contact and promoting assimilation. The Briton, on the other hand, needs no contact or *Einfühlung* with other groups whose modes or fields of thought and feeling differ from his own; he is sufficient unto himself, content with his own limited circle; he is familiar with its manners and customs and considers them the best going, and feels not the slightest need or desire to change or add to them. In his heart of hearts he

thinks the other people lacking in style; that is, their style is not *his* style. The English never associate with subjugated races, never mix or fraternize with them or make friends with them; but neither will they be savage or cruel to them. They never try to understand them or live with and among them; but neither do they attempt to terrorize them by a despotic régime. They preserve order and supply as much 'good government' as possible, by which they mean objective, peaceable, and impartial administration and justice.

It all depends on one's aims. The Dutch believe in moderation, objectivity, and toleration in their administration, and the preponderance of the phlegmatic temperament among them favours such methods in their case too. This temperament also predisposes to some extent towards democratic, or at least modified democratic institutions, the reason being that there is no great likelihood of sudden and spasmodic diminution of consciousness, of party feeling running too high, of extreme points of view and extreme methods; there is greater likelihood of reasoned, objective assessment of the rights of fellow citizens and respect for the opponents' point of view. This all favours democratic government, which is essentially 'government by persuasion'. Among the English the love of compromise, the dislike of the doctrinaire and the extreme, are outstanding characteristics.[1]

Hurwicz attempts to refer differences in national character to geographical and climatic causes, thus taking the same line as Anatole Leroy-Beaulieu and Boutmy. It is an interesting attempt,[2] but for the present can be accorded

[1] See also Boutmy, *Essai d'une psychologie politique du peuple anglais au XIX^e siecle*, 4th ed., Paris, 1916.

[2] The suggestion is put forward that there is a distinct connexion

the status of a hypothesis only. It is a plausible suggestion that geographical and climatic conditions may affect the national character, and thereby indirectly or directly affect political organization. Thus the geographical position of the Netherlands, the 'Low Countries by the Sea', entailing unceasing labour and an endless struggle against water, give a particular turn to the Dutch character; and there is not the slightest doubt that this fact, combined with the consequent need for special measures to make the country inhabitable and productive (namely the construction of dykes and polders) has influenced the nature of the political organization of the inhabitants. But it appears to be open to question whether the connexion is as simple and straightforward as Hurwicz would have us believe. There are some fairly obvious objections. Why does an examination of the ancient Roman national character reveal traits so very different from those shown by the modern Italians? Why

between the factor of nature and the Russian national character, 'between the "intermittency" of the long and severe winter which interrupts work and the "paresse de froid"; between the characteristic climatic extremes and the lack of mental equilibrium and propensity to go to extremes; between the climate which, as it were, constitutes a standing challenge and is at the same time invincible, and the infinite capacity for the most exhausting work, the "flexibilité", the predominance of the more passive kind of energy, the stoicism and fatalism which characterize the national psychology. Emil Boutmy has given us rather too simple an explanation of the contrasts between the English character on the one hand and the Italian and Southern French character on the other hand, attributing these to differences in atmospheric conditions. The air of Italy and Southern France, being warm and dry, makes the skin sensitive and the nerves susceptible, reflexes being quick in consequence; the beauty of the light, translucency of the air, and colourfulness of objects seen, favour artistic sense, clarity of ideas, and a desire to cry out polysyllabic, soniferous and joyful words into the warm air. Whereas in England cold and damp befog the senses, retard reaction to experiences and ideas; the effect is introversive, the will and the intellect preponderate unduly, the imagination is stultified.

is the Irish character so different from the English? The warning against over-hasty deduction may be repeated here; in order to investigate the problem far more material will have to be collected and analysed before we can attain scientifically reliable results showing the connexion between geographical conditions and national character.

2. THE RIGHTS OF MINORITIES

The complete change in the attitude adopted towards the question of what constitutes a nation has given rise to new problems for modern jurisprudence; problems which did not exist in the days when the organism, the organized authority, was the measure of the nation instead of (as is now the case) nationality being the basis of the organism. These problems touch both domestic and international law; they are typical border-line problems.

I have already dealt with nationality as a governing principle in the organization of states and demarcation of their territories.[1] Now even when the principle of nationality is applied as strictly and objectively as is possible (and in practice it is, I may add, only too often disregarded) it could never give us a division and demarcation of modern states which would completely conform to its requirements. In the course of history, conquests and economic and cultural penetration have led to the creation of a number of enclaves. It would be impossible as a matter of practice to draw the boundaries so that all the members of a particular nation (in the sense spoken of above) who have become settled in their domicile should be within the scope of the same political organism. It would be impossible for purely geographical reasons, for that matter; strategic and economic considerations are additional considerations. Hence

[1] p. 200 *ante*.

the new organization of states leaves enclaves inside the boundaries of several.

Under the old method of division, this would not occasion any difficulties from the point of view of legal theory. Those inhabitants who were of a different nationality, who spoke a different language, and whose culture sometimes differed as well, were, being subject to the same organized authority, simply part of the political nation, and that was all there was to it; there was simply no reason why any one should worry himself about the position of these people, who were just subjects, owing the same allegiance as everybody else. This was true at any rate from the purely juridical point of view; though the course of politics did in fact produce innumerable difficulties, as those who held authority in the old Austro-Hungarian Monarchy, the most striking example of a state composed of different nationalities, could testify. Under the dual monarchy, domestic policy was a succession of balancing feats.

Nowadays, however, the problems are not only problems of practical politics, but also problems of law. If nationality is to be made the basis of the organization of authority, what is then to be the political position of those fragments of nations who occupy some territory in a state containing a majority of a different nationality? A simple denial that there is a legal problem no longer meets the case, once the principle of nationality is adopted as the test. And in fact the new organization of states takes cognizance, every now and then, of the rights of 'minorities': as witness Arts. 86 and 93 of the Treaty of Versailles and Art. 62 (and the following articles) of the Treaty of St. Germain.[1]

[1] For a summary of the international treaties and declarations containing the rules governing minority rights see the Report by Baron Heyking to the International Law Association, entitled *The Imperative*

Art. 86 of the Treaty of Versailles provides: 'The Czecho-Slovak State accepts and agrees to embody in a Treaty with the Principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of inhabitants of that State who differ from the majority of the population in race, language or religion' (the German translation spoke of the 'interests of national, linguistic and religious minorities') (*'Interessen der nationalen, sprachlichen, und religiösen Minderheiten'*). And in Art. 93 Poland undertakes to embody in a treaty such regulations as the Great Powers may consider necessary for the protection of minorities.

The intention was to ensure these minorities a measure of autonomy, to confer on them the right to look after their own special collective interests, especially cultural interests (in the matter of education, and preserving their own language). These provisions, which are just from the point of view of the principle of nationality, none the less give rise to a number of difficult questions.

First, is this a matter for 'domestic' law? Undoubtedly, some might say: the relation of the State to those who *form part* of it, though differing in race, language, and faith from the majority of the population, is essentially a matter of domestic law. As against this, there is the fact that the rights of minorities are provided for by international treaties and declarations.

Then is the matter one of international law? Yes, one might say: rules contained in international treaties are to be considered to belong to the field of international law.[1]

Consolidation of the Minorities Rights, A Critical Survey, contained in the Report of the 33rd Conference, 1924.

[1] Poland recognized by Art. 12 of the Minorities Protection Treaty of the 28th June 1919, 'So far as the stipulations of the preceding articles

The question is not just one of legal theory and legal classification, for its solution entails practical consequences. The theory that the matter is one of domestic law will not work in practice. The domestic legislation of a state, says Baron Heyking in the interesting Report on minority rights referred to above,[1] does not satisfy the requirements: 'for the most liberal of laws, as for instance racial autonomy which is now under consideration in Estonia and Latvia, is of no avail if not carried out in practice'. Complaints about and objections to the acts of one's *own* state (when the legal relationship is a purely domestic affair) do not always produce results, the reason being that the judiciary is often prejudiced owing to the influence exercised by the Government. A motion in Parliament will not achieve the desired effect, as it is always possible for the majority to reject it. Baron Heyking says that many glaring examples can be cited from the newly constituted States to illustrate this condition of affairs.

International guarantees of minority rights are therefore called for.[2] But difficulties at once appear, as Baron Heyking admits. The League of Nations is not a super-state: consequently—as some states argue—joining the League in no way detracts from sovereignty. At the same time it is indisputable, Baron Heyking points out, that a 'right' implies the possibility of a claim. The rights of national minorities, if they are to deserve the name of rights, must be enforceable, 'for otherwise they are not rights at all'.

Looked at from the point of view of a contrast between

affect persons belonging to minorities of race, religion or language, they constitute obligations of international interest and shall be placed under the guarantee of the League of Nations.'

[1] p. 220 *ante*, note.

[2] Report of the 33rd Conference of the International Law Association, 1924, p. 503 et seq.

domestic and international law, the problem is indeed one akin to that of squaring the circle. But once we assume the specific character of the League to be as it was developed above[1] then the hope of some settlement of the rights of a national group which finds itself, owing to geographical or economic reasons, part of a particular state—a settlement to be carried out under the general control of the League, or possibly even by it—is not illogical; nor would the result be some legal anomaly. The object of the State may, as we have seen, be described as that of making provision for the several collective interests of a number of people who live together on a particular part of the surface of the earth. Now distinctions can undoubtedly be drawn in this sphere, e.g. the provision for cultural interests, especially education, can be distinguished from others, and a set of interests can thus be separated from the main body. Legally, it is no offence against logic to give groups which live in the same constitutional association the right to make cultural provision for themselves, subject to certain safeguards. From the technical—i.e. administrative and judicial—point of view the matter is indeed not simple. In Great Britain, the difficulties may be illustrated by recalling the 'Passive Resistance' movement which followed the passing of the Education Act, 1903, and the Education (Local Authority Default) Act, 1904, a movement in which Mr. Lloyd George took a prominent part.

But if the solution is difficult, it is not necessarily impossible. If when frontiers are drawn it is found to be inevitable, for geographical or economic reasons, that minorities of different nationality should be included in a state, then it may be desirable—indeed, circumstances may demand it—to *guarantee* just treatment of those groups against the State itself.

[1] p. 189 *ante*.

The interests of public order, of peace and safety within the international community, may make it necessary to take such a step. And the object of the State as well as that of the League of Nations may be served by a settlement of this kind, and it should be effected for this reason.

Apart from this, the organs of the League of Nations have kept themselves, on principle, as much as possible in the background as regards the protection of national minorities,[1] and as a matter of preference have confined themselves to fair words and generalities, such as those contained in the Report made by the Brazilian representative to the General Assembly:

'To attain the ideal aimed at, it will be sufficient if on the one side the governments concerned never depart from the rules of loyalty and if the League of Nations exercises its legitimate supervision, whilst on the other side the persons belonging to the minorities readily fulfil their duty of co-operating like loyal citizens in its national work with the state under whose jurisdiction they stand.'

These are fair words indeed, but from a practical point of view they are rather reminiscent of Elizabeth Wordsworth's rhyme about 'The Clever and the Good'.[2] They contribute nothing to the solution of any of the problems which arise. It is noteworthy that the Belgian representative was in fact constrained, after signifying his complete agreement with the views of the Brazilian delegate, to state expressly that the extension of the system of safeguards for minorities provided by international law to all states would, so far

[1] See, as to the methods cautiously applied in the matter of protecting national minorities *recognized by treaty*, Dr. Otto Junghann's *Das Minderheitenschutzverfahren vor dem Völkerbund*, Tübingen, 1934.

[2] 'If all good people were clever,
And all clever people were good,
The world would be nicer than ever
We thought that it possibly could.'

from ensuring world peace, lead rather to national conflicts in a number of countries, and that international conflicts would be bound to follow in due course.

There are indeed still a number of difficult problems confronting practical statesmen; the theoretical difficulties can, however, be considered disposed of.[1]

[1] The extent to which the theoretical and dogmatic conception of sovereignty still gives rise to difficulties in this field can be seen from the Report by a French committee on the protection of minorities made to the 1926 Conference of the International Law Association: 'Would not things end in the creation of an intolerable state of affairs for the state, whose sovereignty would be threatened by the fact that it would find itself brought to defend itself before an international tribunal against *persons under its own jurisdiction*?' was the question it put (p. 333 of the Annual Report). The conclusion reached by the committee was in the negative, but theoretically the answer was on rather a weak basis, as it invoked the theory of 'self-obligation': states may themselves *desire* limitation of their sovereignty. . . . When the desire changes, does the limitation disappear with it?

CHAPTER VIII

STATE AND CHURCH

THE relation between Church and State has given rise to a number of difficulties of various kinds, both theoretical and practical. The reason why for our present purposes we must consider these to be problems of general interest, and indeed difficult problems, is that both State and Church are group formations, organized societies, and both comprise the same, or to some extent the same, people. The State is a group formation and an organism, possessing organs which enact rules of conduct, prescribe values, and thus exercise legislative power; it has also organs which exercise *executive* power, and others which exercise judicial power, counteracting infringements of the rules enacted. And the Church likewise is a group formation and an organism; the Church, too, possesses organs which prescribe values, administer, and adjudicate. What, then, is the relation of the one organism to the other? How are their legislative, executive, and judicial functions respectively related?

If we reply that the answer is simply this, that the State has a *worldly* task to perform and the Church a purely *spiritual* one, we have said nothing wrong; but neither have we said enough, and the deficiency is considerable. Over quite a number of matters we may find ourselves in doubt about the province, worldly or spiritual, to which they belong. Certain provisions for certain interests at once fall clearly into one of the two divisions, but others are more difficult to classify.

We can see this if we take for inspection the various public services. First, that of national defence: this is obviously a matter for the State; the Church does not wield the sword.

Next, justice and the administration of justice: this is rather more difficult, especially at the stage when there is as yet no clear-cut division between the various values. Consider, for instance, disputes about the marriage laws and the right to contract marriage and about tithes and church property, which was at one time so large a proportion of all real property: should these, we may ask, be assigned to the province of the worldly society, the State, or to that of the spiritual society, the Church? It is the fact that the Canon Law, the legislation and rules of conduct enacted by the *spiritual* society, partly triumphed in this case. Yet we may inquire what should be the relation between this legislation, these rules of conduct enacted by the spiritual society, and those of the secular society; and what should be the relation between the jurisdiction exercised by the one and that exercised by the other.

Consider, again, another public service, that of education; is this essentially the task of the spiritual society or that of the secular society?[1]

Suppose, now, that conflict breaks out between the two societies. The great Pope Innocent III, who occupied the Holy See from 1198 to 1216, and Pope Boniface VIII (1294–1303), both knew the proper answer in this contingency and what the relation between State and Church ought to be: 'As the moon obtains her light from the sun, and is indeed the lesser light, alike in quantity and quality, by nature and in effect, so does the power of the organ of the State, the royal power, receive the light of the papal authority. The sun, the light of day, is the papal authority for souls.'

[1] See Bryce's vivid and graphic description of education at the El Azhar University at Cairo—spiritual and secular matters are inseparably mixed—in his *Studies in History and Jurisprudence*, New York and London, 1901, Part II, p. 647.

The relationship thus propounded is justified by the doctrine of the two swords, which is founded on St. Luke's Gospel, xxii. 38, and is more sharply defined in the Papal Bull *Unam Sanctam* dated the 18th November 1302. The Church has one Head, Christ; His vicegerent here on earth is the Pope, successor to St. Peter, to whom Christ entrusted the flock of the faithful. The Gospel teaches us that the Pope disposes of two swords, the spiritual sword and the secular sword. For when the apostles said to Him: 'Lord, behold, here are two swords'—that is to say, in the Church, for it was the apostles who spoke—the Lord did not answer that there were too many, but that they sufficed. Thus, *both* swords are at the disposal of the Church, the secular as well as the spiritual sword. The former is wielded for, the latter by, the Church, being so wielded by the hand of the priest; while the secular sword is wielded by kings and knights, but *at the will of the priest and as long as he approves.* The secular sword, worldly power, is therefore subordinate to spiritual power. For, as St. Paul says, 'there is no power but of God, and the powers that be are ordained of God' (Rom. xiii. 1). There would, indeed, be no order if the one sword were not subordinate to the other. If, then, the secular power errs from the path of righteousness, it shall be judged by the spiritual power; but if the spiritual power so errs, the inferior spiritual authority shall be judged by the superior spiritual authority. The supreme spiritual authority, however, shall be judged by God alone, and cannot be judged by man, as the apostle testifies: 'But he that is spiritual judgeth all things, yet he himself is judged of no man' (1 Cor. ii. 15). Whoever resists the power thus ordained by God resists God's commands.

The above is a very pure example of the scholastic method; illustrations, such as that of the light of the sun and moon,

were considered tantamount to proofs; and propositions were considered as established by reference to clever and indeed sometimes subtle and laborious expositions of passages of Holy Scripture.

But a far more objective and far more scientific theory about the relationship of Church and State was also propounded in the Middle Ages. It is the theory of one who occupies an important place in the history of political science and jurisprudence, and who to a considerable extent still dominates Roman Catholic theology, namely St. Thomas Aquinas. Aquinas lived in the thirteenth century (1225–74), at the time of one of those life-and-death struggles between the head of a State and the head of the Church, between Frederick II, of the Hohenstaufendynasty, and Popes Gregory IX and Innocent IV. The problem of the relationship between Church and State would naturally attract the attention of the greatest thinker of the century. Aquinas refers the question to its fundamental basis, the nature of the State, which he deals with in his treatise *De regimine principum.*

Aquinas did not share the contempt for the State felt by some of the Fathers, who saw in it the works of darkness, while the Church was the work of God. The Thomist theories are founded on, and elaborate, the views of Aristotle. Man is by nature a social animal, a being that lives in communities; he is meant to associate with others of his kind. It follows from this that there must be leadership in the society, for the common good, the *bonum commune,* must be constantly kept in view. Without this leadership, many would strive after different kinds of things, and the one thing which would benefit all would be lost sight of and not be given its proper place. Consequently it is in the common interest of all that there should be unity of

command; there must be a head of society, or in other words, a government.

Because God, then, has destined man to live in society and intended him to be a social being, leadership and government are also intended by God. In that sense authority is of divine origin. God desired the end, so God must have willed the means, the argument runs. But assuming that authority as such is of divine origin, it does not follow that every concrete authority is of divine origin. Aquinas stops short of recognizing the divine right of any particular authority, of any particular king or dynasty. Not a single sovereign derives his authority direct from God, and not one is entitled to call himself absolute ruler of his subjects. He even concedes the right of a people to depose a tyrannical ruler, a ruler who executes his functions unjustly; or to restrict his power: 'A tyrant's rule is unjust; for it is not ordained for the common good. Therefore, the destruction of such a rule is not to be deemed seditious. Rather, the tyrant is himself a rebel.'

In this, Aquinas by implication bases his opinions on an obligation binding upon authority to observe a particular mode of conduct and behaviour. He postulates a system of values by which the specific function of authority is governed: the duty to fulfil its task *ad bonum commune*, in the *common* interest of all and not, say, in its own interests or those of its relations or class.

'Authority' in the abstract is thus of divine origin; but this is no concrete authority. No particular form of authority enjoys divine rights; for St. Thomas Aquinas there is no such thing as a 'divine right of kings'.

The *bonum commune*, on which the eyes of those who rule must—by virtue of their nature and the essential character of their authority—be fixed, is, St. Thomas proceeds to

argue, something determined by the general *destiny* of mankind. On earth, this consists of a virtuous life and a harmonious development of man's talents, giving him temporary happiness; but his fundamental and true destiny is supernatural and concerns everlasting life and eternal bliss.

Now to attain this higher end, supernatural aid is necessary. The power to enable man to achieve his *supernatural* destiny is in the hands of the Church alone. It is the vocation of the Church to communicate to mankind the rules of life, the values, which she herself received from Christ. Secular powers, those clothed with authority by the State, have not only to adopt and apply those values themselves and to themselves as men and as leaders of their communities: they must also be conscious of their duty to assist the Church in fulfilling its vocation. The State is, therefore, a collaborator of the Church: it is the organization which serves to realize those temporary human ends which in the Church's judgement harmonize with man's destiny. The State ought to help to establish the *bonum commune*, as the Church sees it, on earth.

The system is certainly coherent; the argument is logically consistent and confirms Aquinas's reputation as a thinker. Looked at from a scientific point of view, this theory is of a completely different order from that of the two swords. And to this day the importance of the Thomist teaching is considerable, especially in Roman Catholic political theory. Pope Leo XIII, himself an eminent savant, promoted a revival of the study of Aquinas's doctrines, and to some purpose.

Aquinas's theory, as I say, is of far greater significance than its rival from the point of view of pure science; yet it must at the same time be appreciated that it makes the relationship of Church and State far less stable and is far vaguer than the much more primitive theory of the two

swords. For Aquinas makes the secular power independent to this extent, that the State is competent to promote the *bonum commune* on earth with such worldly, human means as it considers best. The supremacy of the Church, which he acknowledges in the abstract, does not imply any *continuous* or *direct* intervention by the Church in temporal, secular affairs, and consequently no such interference with the work of the State. State and Church are distinct, *ut a terrenis essent spiritualia distincta* (so that spiritual matters may be distinguished from worldly matters). It follows that the civil authority is not only entitled, but is under an obligation, to act independently in the interests of Society. The Church does not govern the State *absolutely*, nor is it entitled to intervene every minute in the working of the State.

This is indeed a more moderate opinion; but it gives us a far less explicit indication of what is to be done in practice than did the theory of the two swords. The reason is that Aquinas did not develop in detail what he meant by 'free sphere of operation of its own'. Earthly and spiritual affairs are 'distinct', he says; true, but in certain circumstances some contact is inevitable, and they are sometimes closely bound up one with another.

At the beginning of the fourteenth century a remarkable work made its appearance, attributed to William of Occam, who also fills an important place in the history of philosophy. It took the form of a dialogue between a churchman and a soldier, in which the parties discussed the plight of the Church. The argument is conducted by means of concrete examples, as might happen to-day in the case of a pamphlet or a newspaper article. William of Occam also disputed the claim of papal supremacy over secular authority in more scientific form, namely in his *Octo quaestiones super potestate*

et dignitate papali and in Part III of his 'dialogue', *De potestate papae, consiliorum et imperatorum.*

The appeal to texts for the purpose of proving the supremacy of the Pope is, he contends, not conclusive. When we read in the Gospel 'whatsoever thou shalt bind on earth shall be bound in heaven; and whatsoever thou shalt loose on earth shall be loosed in heaven' (St. Matt. xvi. 19), these words refer only to the spiritual sphere, to the sacrament of Penance. The texts 'Feed my sheep' and 'I will give unto thee the keys of the kingdom of heaven' prove clearly that the authority of the Vicar of Christ is not secular, but purely spiritual: 'My kingdom is not of this earth'. And Occam rejects the Old Testament text habitually invoked by protagonists of the Church, a passage from the Book of Jeremiah (i. 10): 'See, I have this day set thee over the nations and over the kingdoms, to root out, and to pull down, and to destroy, and to throw down, to build, and to plant', on the ground that Jeremiah was not a priest, but a prophet; and even if this were not the case, on the ground of the New Dispensation, because the New Testament gives the priesthood quite a different character, a more spiritual character, than does the Old Testament.

As regards civil authorities, the Emperor and the King of France always acted on the assumption of an independent, direct grant of power by God to the ruler. In support of this, two well-known passages in Romans xiii. 1 and 2 were cited:

1. 'For there is no power but of God: the powers that be are ordained of God.'

2. 'Whosoever therefore resisteth the power, resisteth the ordinance of God; and they that resist shall receive to themselves damnation.'

Dante contends in his *De Monarchia*, Book III, that the Emperorship derives its power direct from God and is there-

fore not dependent on the Pope. Admittedly there are some matters in which the Emperor must respect the Pope and is inferior to him, just as a son owes respect to his father; but in principle Dante disputes the opinion that the relationship of ecclesiastical and State authority is that of sun and moon.[1] And yet he declares himself to be a good Catholic, a faithful son of the Church.

The age-long conflict was not decided by the amount of knowledge possessed and intelligence shown by the arguments of the various writers. It was resolved by the amount of inherent force and coherence possessed by each of the different systems of group organization. The decision rested upon the relative power and ascendancy of each over the minds of group members. When in the course of the struggle between Pope Gregory VII and the Emperor Henry IV the Pope had pronounced sentence of excommunication on the Emperor, the State's authority had ceased to exercise power over men's minds; the Emperor forfeited the support of most of his vassals and of practically the whole of the clergy, and was ordered to go to Canossa and do penance there, in 1077. On the other hand, when in 1302 the French King Philip the Fair summoned the assembly of the three estates in order to obtain their support in his struggle with Pope Boniface VIII, the Third Estate declared, 'From thee, most noble prince, our liege lord, Philip by the grace of God King of France, the People of thy Kingdom

[1] Op. cit., p. 102: 'Dico ergo, quod licet Luna non habeat lucem abundanter, nisi ut a Sole recipit, non propter hoc sequitur, quod ipsa Luna sit a Sole. Unde sciendum, quod aliud est *esse* ipsius Lunae, aliud *virtus* eius et aliud *operari*.'

'I say then that though the moon does not have light except it receive it from the sun it does not therefore follow that the moon itself is derived from the sun. From this we may realize that the essence of the moon itself is one thing, its virtue and operation another.'

(in so far as what happens concerns them) request and demand that thou preserve the Sovereignty and liberty of Thy Kingdom, which is such that thou *dost recognize in temporal matters no sovereign on earth save God* (*que ne reconnaïssez de votre temporel souverain en terre fors que Dieu*) and that thou cause to be declared, so that all may know it, that Pope Boniface has clearly erred, and palpably committed mortal sin, by informing thee by papal bull that he was thy Sovereign in thy worldly power (*qu'il étoit votre Souverain de votre temporel*)'. The dispute was settled; Canossa was not to be repeated. The attempts to establish the supremacy of Church over State had failed. Towards the close of the Middle Ages and at the commencement of the New Era royal power was indeed very strong.

Civil authority found itself confronted by difficulties of quite a different kind when the State no longer had to deal with a single ecclesiastical organization, *the* Church, but, once the Reformation had split the religious community into fractions, with different religious organisms. What should be the relation of the State to these several religious communities? The various confessional organizations were organized on fundamentally different lines. The Reformers' view of the ecclesiastical community was quite different from that of the Roman Catholics, and this was bound to affect the Reformed Churches' view of the relation between the State and the ecclesiastical community. The Reformation had emphasized the tie between the individual soul and God; the centre of gravity of the Faith was transferred from relationship to Christ by the mediation of the Church to relation to Christ on the part of the individual consciousness. Fundamentally divergent opinions were entertained as to clerical hierarchy and ecclesiastical power. The priestly hierarchy which culminated in the Pope was

replaced in some countries by teachers enjoying equal status. Opinions as to authority over souls were completely changed.

In a book by a Dutch writer, Dr. De Visser, the author quotes with approval Bluntschli's words: 'Whatever the modern State maintains to be its exclusive right—legislation, administration, justice, in which it refuses to recognize the Church as its rival—was conceded to it by Luther.' How true is this? Luther did not always adopt the same attitude towards the question of the relationship of Church and State. This can be explained by reference to contemporary circumstances. In order to appreciate the reasons for his views, we must consider the facts with which political organizations found themselves confronted as a consequence of the change in religious opinion, and the problems which the disintegration of the ecclesiastical community and its splitting up into different organizations placed before the civil authorities.

There were several possible courses open to the State as civil authority, and different attitudes were in fact adopted towards these new and formidable problems. In order to understand the conflicts which arose, it is necessary to try to appreciate thoroughly the actual facts of the situation. It will be found that the organs of State were often unable to pursue and carry out the particular policy they themselves desired and selected, and that they were driven by force of circumstances to adopt a position which simply *imposed* some particular policy on them. The various stages of the career of William the Silent afford a tragic example of this. It is a situation, indeed, which is far more frequent than is often supposed. In the words of Faust, *Du glaubst zu schieben, doch du wirst geschoben.*[1]

[1] 'You think you are pushing, but in fact you are being pushed.'

One position which the governing authority of the State might take up towards the dissensions in the Church and the collapse of the religious community was to oppose, with all available resources, whatever belief authority considered pernicious to its subjects. When we bear in mind Aquinas's theory of the relation of Church and State, it is clear that this question of regulation was a task for the State. Moreover, one of the first duties of the organs of civil authority is to maintain public order. The dissensions repeatedly threatened public order because the adherents of different denominations, burning with religious zeal, fell foul of one another. The task of maintaining order imposed on the State is, according to Hobbes,[1] the strongest argument against religious dissension.

The other attitude which authority might adopt towards the schism was this: it might hold itself aloof and consider the events as events of a purely *spiritual* nature with which it, charged as it was only with the care of citizens' temporal collective interests, was not concerned. At the same time, the very violence of the religious conflict, in which the combatants did not confine themselves to the use of spiritual weapons but resorted to force, compelled authority to resort to force itself again and again; and for that force it had often to rely on particular sections of the nation.

These difficulties are, I think, reflected in Luther's views on the matter. Luther's views have been the subject-matter of a good deal of study. 'While the tendency used to be to declare that the demand for liberty of conscience, which at the very outset destroys the unity between the ecclesiastical and State organizations, was a principle of the Reformation, the modern opinion, advanced chiefly by Karl Rieker, is

[1] See p. 11 *ante*.

that in this regard Luther's attitude was thoroughly medieval'.[1]

Exponents of Luther's views are indeed confronted with difficulties on this point. In his earlier days he held radical opinions about the relationship between the civil power and the faith, and these were in keeping with his views about the liberty of the Christian, who may do nothing against his own conscience. Heretics were to be converted by writings, as the Fathers of the Church had done it, not by fire. 'If there were any achievement in converting heretics by means of fire, then executioners would be the most learned doctors on earth and we might as well give up study; any one who could subdue another by force could burn him.' Luther was in favour of separating the field of law from that of religious values: 'if you are a prince, judge, lord, or lady and there are people under you who have to account to you and you want to know how to act, you do not ask Christ but resort to the domestic law of your country which will direct you as regards your behaviour towards subjects and your duty to protect them'. 'The worldly power has its laws which are limited to matters of life and property and to what is *external* on earth; for over the soul God will permit no man to rule, save Himself alone. Therefore, when worldly authority presumes to lay down laws for the soul it usurps God's power, and in the result leads astray and destroys souls.' 'We want', says Luther, 'to make this quite clear, so that our young men may appreciate what fools princes and bishops make of themselves when they seek to *compel* people, by means of their laws, to believe this or that.'[2] This is all plain enough.

But stern reality caused Luther to modify his views about

[1] Karl Rothenbücher, *Die Trennung von Staat und Kirche*, Munich, 1908, p. 12.

[2] Op. cit., p. 13.

the relation of Church and State. He saw members of what in his opinion was the true faith threatened in life, liberty, and property everywhere; and reformed rulers and authorities constrained to protect the flock with their secular power, with the secular sword, lest they should perish. Thus he was driven by necessity to the view that authority too must, in its way, serve Christianity. Heresy is not in itself a crime against the State, but it must not be openly proclaimed. When it is taught, for instance, that there ought to be no authority, or that a Christian ought not to wield authority, or that private property should not be allowed, the erroneous doctrine in question should be punished like treason; blasphemy is likewise punishable when the heresy attacks what is the common property of Christianity, e.g. when it denies the divinity of Jesus. Sometimes it ought to be made punishable as being a threat to break the peace, e.g. if different religions be propagated in the same district and hatred, faction, and strife are fostered in consequence. In the last sentences the influence of hard facts is clearly discernible.

Luther's change of attitude towards the problem revealed itself in a remarkable and subtle way. Authority is not clothed with power to act as protector of the church, as supreme bishop; the authority is of course not *summus episcopus*—but the public must be protected. Now the authority is a member of, one of, the community. The community as a whole is entitled to depose priests who preach error; in this matter, authority represents the public as *praecipuum membrum*, chief member; it then places its power at the disposal of the ecclesiastical will. The public may then occupy the place which has become vacant; the authority, acting as chief member, does this for it. In other words the ruler, acting in the name of the community, may

reform the Church. He reforms it in his capacity as *praecipuum membrum*, but none the less carries out the reform himself. In this way the ruler acquires influence in and power over the Church.

This reasoning, or 'theory' if you will, can likewise be explained by reference to the special circumstances surrounding Lutherism; it was, one might say, evolved to meet an emergency. First, defence of the interests of the Reformation by recourse to the secular sword, by the ruler, had become a necessity; and then the personal safety of the Reformers themselves had come to depend on their being protected against the attacks launched against them. Further, the overthrow of the Roman Catholic ecclesiastical organization automatically created a need for intervention in a number of affairs by some organizing, regulative secular power. Take the matter of administering and managing Church property, or property bequeathed for special religious purposes. What was to happen to it? In the Netherlands, for instance, the danger of injustice resulting from trustees, as it were, holding property and funds for which there was no beneficiary compelled the authorities to take these over.

So force of circumstances—the protection and preservation of the Reformation itself, and the need to bring order out of the chaos, occasioned by the overthrow of the old ecclesiastical organization and hierarchy—*compelled* the various pro-Lutheran authorities, that is to say various German territorial rulers, to assume power over and leadership in the Church. This explains how the German rulers came to occupy the special position they occupied in the Lutheran Church. There was still a purely ecclesiastical organization; the Church had its own consistoria and superintendents; but the ruler was the constituent authority

for consistoria and appointed and controlled superintendents. Further, the ruler had legislative power; it was at first limited, the deputies of the estates having some say, but as his power became absolute, legislative power became unrestricted. In the end there was no question of any *legal* limitation on the ruler's power over the Church, either by the clergy or the congregations. True, in theory there was the fundamental principle by which the ruler was bound to exercise his power in the interests of the Church, and not to make any important decisions about matters of doctrine, forms of service, liturgical matters, &c., otherwise than *consensu ecclesiae*; but in practice this made little difference, as there was no machinery for seeking and obtaining the *consensus ecclesiae*. Recourse was then had to the maxim *qui tacet consentire videtur*—the fiction that the silence of clergy and congregations implied their consent.

Orthodox Calvinism takes a different view. Calvin, it is true, begins by differentiating between the tasks of the political community and those of the Church. The object of *both* State and Church is to bring men to, and preserve them in, the true faith and obedience to God's laws; but they differ in this, that the Church's authority is exercised over souls, and it regards eternal life; while the State is concerned with the outward conduct of human beings only, and should supervise civil, outward moral probity.

I emphasize 'moral probity', outward conduct which conforms to God's commands, for this is obviously a very important factor with far-reaching consequences, which affect the attitude of authority to the religious and ecclesiastical life of its subjects.

'God is King, God is sovereign', sovereign in the most absolute sense: such is the basis of Calvin's religious doctrine, and at the same time of his political theory. 'God

is Sovereign': this must be given full effect, not only as regards internal religious life, not only as regards the citizen's private life, but also as regards his national life, his public life. If this were not so, then some fields of human life would cease to be under the sway of God's authority, and this would be a violation of his Supreme Majesty.

Thus God is monarch in the State, sole monarch. There is no power which is not derived from Him. No ruler is king *suo iure*; rulers are but 'the hands of God', servants and vicegerents. They have therefore to govern as instruments of God, not according to their own wills but according to God's law. If a ruler fails in this he infringes the fundamental principle of his authority and becomes a tyrant. Being subject to the law of God, he has to promote *true* religion and combat idolatry. He must always act in the public interest, for the ruler is there for the people and not the people for the ruler. The only basis of authority is the will of God; authority acts as God's instrument.

It is an imposing and impressive system, at first sight completely coherent and water-tight. But it is also clear that it tends to subject the State completely to the commands of God—*as conceived by those who have become privy to the only true doctrine*—in other words to make the State an *instrument* for fulfilling the spirit of the Church in which the orthodox find their communion.

And in this way Calvin formulated a rigid theory at Geneva, at which place he personally dominated, thanks to his strong personality, the religious and political life for some decades. Church and State complemented one another, like soul and body. Authority is the power which must make not only theft, murder, and assault punishable, but also whatever prejudiced the true religion: unbelief, blasphemy, idolatry. Servet was burned at the stake.

Thus the two most influential of the Reformers did *not* attain to tolerance as a matter of principle. In those days the principle of toleration was recognized among the Baptists and some of the Humanists only. The Baptists regarded the Church as the old apostolic congregation of Christians born again. The congregation, formed by the voluntary union of true Christians, is a voluntary spiritual community, and contrasts with the ancient institution of the Church, which Baptists reject once and for all on account of its worldliness, its mingling with political and mundane aspirations.

As regards the Humanists, in More's *Utopia* the inhabitants have different religions, but they all worship the Supreme Being. All that is demanded of the individual is belief in the immortality of the soul and in retribution. Whoever doubts these things can hold no public office; but he is not excluded from the State. There is a public religion for the worship of the Supreme Being, so constituted that the adherents of all religions can take part.[1] Whoever attempts to propagate his opinion by means of force is liable to exile or reduction to slavery.

It is my opinion that the mere facts that different religious faiths have been established within the territory of a single political state and that these faiths have been clung to by many of their adherents with an unshaken devotion, found to be proof against persecution, and a determination and steadfastness which compel admiration, has achieved more than any *theory* about the relationship of Church and State, however ably and cogently explained and expounded. It is one thing to listen to a more-or-less water-tight theory about

[1] The 'Enlightened Period' of a later age also cherished a Utopian idea of this kind. Frederic the Great proposed to found a Pantheon in which all religions might be exercised.

secular and spiritual power and to find it acceptable; it is another to see one's own fellow citizens, people who have not harmed their fellow-men by any kind of *outward* crime, who, on the contrary, usually lead modest, quiet, and virtuous lives, go to the stake pursuant to that water-tight theory.

The Dutch national character, to take an example from my own country, is not very disposed to adopt the policy of placing the civil power at the disposal of the Church, the policy of directing all the powers of the State so as to serve one religious community by persecuting, punishing, and exterminating dissenters who have conscientiously embraced a different faith. Historically, such action went against the grain of the Dutch character, with its sense of freedom and its streak of individualism, engendered by the age-long and hard-fought struggle against water, and the experience of navigating the seas. Citizens strongly opposed any such policy. This was not due to conscious acceptance of a *theory* about the relationship of Church and State; it was simply the consequence of emotional repugnance, such as was aroused in England by the persecutions under Bloody Mary.

Motley's classic, *The Rise of the Dutch Republic*, contains many examples of the remarkable tolerance exhibited by William the Silent. In 1572 the Prince instructed Sonoy 'to see that the Word of God was preached, without, however, suffering any hindrance to the Roman Church in the exercise of its religion; to restore fugitives and the banished for conscience' sake, and to require of all magistrates and officers of guilds and brotherhoods an oath of fidelity'. The oath in question, prescribed by the Prince, provided against intolerance.[1] 'Freedom of worship for all denominations,

[1] *The Rise of the Dutch Republic.* A new edition, Routledge & Sons, 1874, p. 472.

toleration for all forms of faith, this was the great good in his philosophy' says Motley.[1] And, later: 'No man understood him. Not even his nearest friends comprehended his views, nor saw that he strove to establish not freedom for Calvinism, but freedom for conscience.'[2]

William's approach was that of a statesman, however, and he discouraged the use of force for political reasons. 'The Emperor Julian understood these things better,' he said 'took more gentle measures against those he had to deal with, and achieved more.' Badgering, oppression, and violence would merely have stimulated their zeal; liberty, apparent indifference, and inactivity lulled them to sleep: 'Compulsion cannot touch the soul'.

The same principle was applied by Elizabeth of England, who likewise was not a religious fanatic, in the Proclamation issued after her excommunication:

'Her Majesty wôuld have all her loving subjects to understand that as long as they shall openly continue in the observation of her laws, and shall not wilfully and manifestly break them by their open actions, her Majesty's means is not to have any of them molested by inquisition or examination of their consciences in causes of religion; but to accept and entreat them as her good and obedient subjects. She meaneth not to enter into the inquisition of men's consciences as long as they shall observe her laws in their open deeds.'[3]

A declaration made by William the Silent to the parliament of Holland in 1572 was in wider and more explicit terms; for by it freedom of religious exercise was also ensured. Unfortunately the trend of events made complete fulfilment of this policy impossible, both in the Netherlands and in England. For the policy pursued by Philip II, an imperialist

[1] Ibid., p. 535. [2] Ibid., p. 760.

[3] Prof. Arthur Jay Klein, *Intolerance in the Reign of Elizabeth, Queen of England.* London and New York, 1917, p. 37.

in religion as well as in politics, aroused so much bitterness and fear in both countries, including fears about Roman Catholics of their own nationalities, that an anti-Roman Catholic policy became inevitable. The Union of Utrecht (1579) did no more than recognise internal freedom of conscience, Art. 13 providing that no man should be examined as to his religion. Later Oldenbarnevelt, at his trial, made the point that this was merely declaratory of the existing common law. Throughout the whole of the seventeenth century the principle of toleration was being fought for, in the Netherlands and elsewhere. Persecution compelled Spinoza to reside at Rijnsburg, which, having been at one time monastic property, was under the direct control of the parliament of Holland.

It was not till the eighteenth century that the battle was won. The so-called 'Enlightened School' of thought acquired considerable authority in influential government circles. It is difficult to over-estimate the influence exercised by the writings of Voltaire and the 'Encyclopaedists' on cultural life. Voltaire especially was widely read. He propounded and popularized the results obtained by English natural science and English philosophy in the seventeenth century, the conclusions of Newton and Locke. A new view of the universe and its nature and structure gained acceptance everywhere; man's whole idea of the world underwent modification. Newton's discoveries made the theory that all parts of nature formed a coherent whole and obeyed fixed laws—the theory of the unity of the universe—acceptable. As to the functions of the State, of Society, and Law, the view was held, as we have seen,[1] that the facts can be most intelligibly and simply explained by the operation of natural reason, with the assistance of the

[1] p. 8 *ante*.

hypothesis of the *agreement* made by individuals living lawlessly in a state of nature, to form a community, to wit the State.

Locke thought that this hypothesis warranted an *inference* to the principle of *toleration*, in other words that toleration as a value prescribed by constitutional law could be *proved* to be just by science.[1]

The State, according to this theory, is, as we saw, set up by individuals under a contract to protect rights which are man's nature, namely the rights to 'life, liberty, and property'. Such is the object of a contract to form a State, and for this reason the State has no rights which extend beyond what is necessary for this definite object. It follows that the State is concerned only with 'the things belonging to this life', with the promotion of the 'civil interests' of the individuals who created it with that very object. The power of the State 'neither can nor ought in any manner to be extended to the salvation of souls'. 'Neither can nor ought': note that the State, the Civil Authority, may not do this, for there is no evidence that God Himself has ever given any human being the right to compel another human being to adopt *his* religion, and it is untenable that the people should by consent have given such power to Authority. For no one can abandon his own eternal salvation to such an extent that he could blindly leave to any one else, ruler or subject, the choice of what faith he is to embrace. And Civil Authority cannot do this, even if it may and wants to. For all the life and power of true religion consists in inward and complete conviction of faith. This expresses in the language of theory and philosophy William the Silent's significant words: 'compulsion *cannot* touch the soul'.

[1] *Essays on Toleration.* Locke himself belonged to the Established Church, so his discourse demonstrates his scientific objectivity.

It is remarkable to see how much influence these new and freer ideas, propounded by the genius of Voltaire with his inimitable clarity and presented in his brilliant style, exercised on the minds and policy of such rulers as Frederic the Great, who was by far the most talented and powerful of the Enlightened Despots of the eighteenth century. Frederic profoundly admired the 'Enlightened' school in general and Voltaire in particular. He was intimate with Voltaire, invited him to his court, and again and again fell under the spell of Voltaire's intellect and erudition, though ultimately an estrangement took place.

But Frederic the Great was also a powerful ruler, with a strong sense of monarchic power and an inflexible will. He was himself anything but orthodox in his religious views—spiritually, he belonged to the Enlightenment—but he had no intention of giving up Crown rights in the Church. In his kingdom 'every one was to seek his own salvation in his own way' (*Soll jeder auf seiner Façon selig werden*), as he proclaimed; but the tutelage exercised by Civil Authority over the Church continued. It is clear that this inherently self-contradictory attitude of Civil Authority could not continue indefinitely.

The only possible solution of such a problem, when minds have become ripe for toleration, is to adopt the principle of disestablishment. Accordingly we find the principle of complete religious freedom solemnly stated in the American Declarations of Rights.[1]

In the French *Déclaration des Droits de l'Homme et du Citoyen*, which George Jellinek has proved, confuting Boutmy on this point, to have been inspired by the American Declaration, it is more briefly and tersely stated, in Art. 10:

[1] See, for instance, Art. XVI of the Declaration of Rights of the State of Virginia. For the contents, see p. 154 *ante*.

'No one ought to be molested for his opinions, even his religious opinions, provided that his expression of them does not trouble the public order which the law has set up.' This goes no further than Art. 13 of the Union of Utrecht. But the Constitution of the 3rd September 1791 guarantees, in Title I, 'Dispositions fondamentales garanties par la Constitution': 'as natural and civil rights: freedom to every man to speak, write, print, and publish his thoughts, without having his writings submitted before publication to any censorship or form of inspection, and to follow the practice of the religious sect to which he belongs'. Further, all citizens are assured of the right to hold office and exercise functions 'sans autre distinction que celle des vertus et des talents'; adherence to a particular religion is not to disqualify for office. Finally it is laid down: that 'citizens have the right to select or choose the ministers of their sects'.

In 1798 the Constitution of the Dutch Republic provided for complete impartiality on the part of the State towards all religious denominations, and adopted the principle of disestablishment.

But things moved too swiftly, and a reaction set in; this did not, however, cause most Western States to depart from the principle of disestablishment. Some difficulties due to the former connexion had to be settled by compromises, e.g. in the Netherlands, where the financial connexion had to be dealt with in this way; and the State still guarantees the clerical stipends payable by the various sects and denominations, as a consequence of having taken upon itself the care of ecclesiastical property at the time of the Reformation.

In Germany the Weimar Constitution did away with the rights of the civil authorities in the affairs of the Lutheran Church. 'There is no State Church' (*Es besteht keine*

Staatskirche) runs Art. 137 of the 1919 Constitution of the Reich: 'Every religious association shall organize and conduct its own affairs, within the limits of the general law. It shall make appointments to office without the co-operation of the State or of the civil authorities.' But in Germany, too, there were financial relations between State and Church. The German Constitution accordingly propounds the principle of liquidation: 'All claims by the State against religious associations, whether based on law, agreement or some special legal title, shall be liquidated by means of legislation to be passed by the State,' says Art. 138; 'The Reich will lay down the governing principles.'

In England the trend of events was curious, and afforded another example of the remarkable discrepancy between the content of political rights and the way in which and the extent to which they are exercized. In theory Parliament controls the Church; for the doctrine by which Parliament is sovereign applies no less to ecclesiastical affairs. The royal supremacy in those affairs, established as regards the Church of England under the Tudors, has become Parliamentary supremacy. But in practice Parliament, whose membership comprises people of widely different religious persuasions (all religious disqualifications were abolished in the nineteenth century, first as regards Roman Catholics, then for Jews, and finally for atheists) concerns itself very little with religious affairs. True, the Revised Prayer Book was twice rejected by the House of Commons, in 1927 and 1928. This was a surprise for many, and indeed a very painful surprise; for it again raised the broad question of constitutional relations between the State and the Church of England. But, speaking generally, it may be said that a *modus vivendi* has been arrived at, which applies the modern principles of the relation between Church and

State. A contribution to a Dutch publication by Prof. N. Sykes[1] concludes with these words:

'While there are many anomalies in theory in the relationship of Church and State in England (which run parallel to corresponding anomalies in the political constitution), and the principles of common sense rather than those of abstract logic govern the situation, yet that relationship does not violate the fundamental spiritual liberty of the Established Church. This relationship reflects the character of the English people, which does not worry about academic errors in constitutional structure as long as the system works in practice. Judged by results, the Established Church needs no apology save what can be found in the study of her history. Within the wide field of *Ecclesia Anglicana* various schools of thought and various movements are to be found, each of which makes some contact with the various elements in the national character, and which attract people of different talents to her service. Except in the sphere of party strife, each movement learns much by its association with the others.'

How positive law should provide for the relation between Church and State is essentially a matter for the positive law of each country concerned.'

If in the Western States the course of development favoured disestablishment, i.e. State neutrality towards religious associations, the 'totalitarian state' system raises the same problem in a different form. The idea of the 'nation', the idea that the individual personality should be completely merged in and assimilated to the nation, which is judged to have more value, is essentially one which is at variance with the tenets of Christianity. These insist upon recognition of the fact that all members of the human race, as children of God, are equally valuable as personalities

[1] Prof. N. Sykes, 'The relationship between Church and State in England', contributed to *De Kerk in de branding* (*The Church at the Cross-roads*), published for 'Kerkopbouw', Nijkerk, in 1936.

and are subjects enjoying equal status. The view that politics are a form of power-technique, an aspect of the 'Friend and Foe' relationship, is diametrically opposed to the Christian teaching 'Love your enemies'. The application of the racial theory as a principle of national legislation and policy is essentially un-Christian. It is consequently not surprising that Christian churches should find themselves opposed to these ideas and to their being put into practice. But under the totalitarian state system this is tantamount to rebellion: 'he who is not for me is against me'. The State has become absolute ruler, has been deified as an all-pervading god, and whosoever does not completely submit shall be cast down and destroyed.

The governments concerned are accustomed to *declare* that they do not wish to concern themselves with matters of faith and religious persuasion, but in fact it is impossible for them to avoid conflict with religious persuasion, for the simple reason that the concept of the State, the organization of the State, and the mode in which the State functions are all at variance with the fundamental principles of Christianity. The saving clause in Art. 24 of the 'immutable 25-point programme' launched at the Munich party conference of the National Socialist Party in 1920 is repugnant to the preamble of the article itself. 'We demand the freedom of all religious confessions in the State, in so far as they do not emperil its existence or *conflict with the moral sense of the German race.*' As it is for the hierarchically organized government to say what 'the moral sense of the German race' demands, the freedom of religious confession is made completely dependent on the Civil Authority.

Conflict was therefore bound to arise, and has in fact arisen. Though the government has given repeated assurances that the National Socialist State does not wish to

interfere in church life, in practice things have turned out very differently. For example, on the occasion of some controversy as to the election of a bishop, Frick, a Minister of the Reich, entrusted the task of organizing Evangelical church affairs to a civil servant, one Dr. Jaeger, as temporary commissioner. The power of the State was thus used in order to complete the *Gleichschaltung* of the German Evangelical Church.

Churches are apt to be most vulnerable in the matter of education. In the Spring of 1936 the Confessional Group, perturbed about the official propaganda for the 'new paganism' carried on among its own young members, issued a manifesto which appeared to strike at the Reich Government itself. The reply of the Reich authorities took the form of consigning twenty-four refractory teachers to concentration camps. The conflict is still in full swing.

The same thing has happened in the case of the state which has created an all-powerful authority in the name of 'the dictatorship of the proletariat'. The authorities have not remained neutral, and have come into conflict with the Church. Here, too, the official *pronouncement* favours disestablishment. Art. 4 of the Soviet Constitution of 1918 provided: 'In order to make true liberty of conscience possible for the workers, the Church shall be separated from the State, and the school from the Church; freedom of religious and anti-religious propaganda is conferred on all citizens.'

But in fact a policy of suppression and persecution was embarked upon. Deportation, arrest, and shooting of priests, bishops, and monks by soldiers, secret police, and fanatics followed; the confiscation of churches and monasteries was resorted to, and in fact all the measures by which the State can injure the Church were taken. Once more we

are face to face with an example of the phenomenon which occurred at the time of the Reformation in England and in the Netherlands: apprehension that assistance would be afforded by the Church and its servants to the hated political opponent drove people to excesses against them.[1]

Apart from this, however, the underlying principles of the Soviet State favour intolerance. It is an absolute government state, which recognizes no guarantees of individual liberty. The interests of the State, which, according to Communist ideology, means the rise to power of the working class, constitute the only test of right and wrong. The Soviet State professedly acknowledges but one *Weltanschauung* as the true one, namely the Marxist *Weltanschauung*, according to which it is necessary to create a new kind of human being, if need be by force. It follows that any open avowal of a different *Weltanschauung* than that stamped with the approval of the State constitutes an obstruction and is to be forbidden. In the light of this *Weltanschauung* religion is, moreover, deemed to be an obstruction and a danger, being 'the opium of the people'; obviously the Civil Authority cannot allow the unrestricted sale of morphine. Looked at in this way, the prohibition of religious propaganda is fully in keeping with a system which is constructed like a machine made of steel. For this reason the freedom to conduct religious propaganda granted to the Church by the 1918 Constitution was subsequently withdrawn. Only the freedom of religious exercise, i.e. the holding of services, is allowed; propaganda, active zeal for the promulgation of the faith, is prohibited. In 1929 a five-day week was introduced, every sixth day being a holiday, so that the

[1] The Spanish Civil War being waged at the time of writing emphasizes this and exemplifies one of the tragedies of civil warfare so masterfully described by Thucydides.

institution of Sunday as a national day of rest was abolished and it became more difficult for workmen to attend Sunday services.

It is too early as yet to say what will be the ultimate effect of all this on the religious life of the Russian community. According to several authorities the events described are likely to have a purifying effect. Before the Revolution many adherents of the Russian Church itself, especially those of a deeply religious nature, felt that the patronage extended by the civil authority to the Church was humiliating, and sought to establish true freedom and independence of the Church.

'Generally speaking, the Church', says an article by Professor Frank,[1] 'readily adapted itself to the changed conditions brought about by the fall of the monarchy, and the opinion is confirmed that the Church of Christ, with its eternal vocation, is not tied to any particular form of government or organization of Society but can and must fulfil its divine mission in any worldly circumstances. This opinion, which finds expression in the independence as regards civil authorities of the organization and government of the Church, and in an almost complete separation between Church and State, dominated the atmosphere of the 1917–18 Council and the church reforms which it instituted. This opinion can now be considered one which is generally held in the Russian Church.'

After passing through a mood in which eschatological and apocalyptic feelings prevailed, one which set in in the early days of the worst persecutions, Church authorities now look with favour on attempts to arrive at a *modus vivendi* with the State. This would have to be based on political loyalty by the Church on the one hand and its complete independence of the State as regards its domestic affairs on the other hand.

[1] In the same work as Prof. Sykes's article referred to on p. 251 *ante*.

'The Church may undertake', says a memorandum issued by the Episcopal Synod, 'not to interfere with the State in its work of prescribing standards of *external conduct and exacting obedience to the law*; the State for its part is not to hinder the Church in her religious activity. The Christian Church has always—for example in pagan times, or in Turkey—obeyed State authority in all matters which do not concern the faith. The Church desires a genuine separation of Church and State.—Actuated by these principles the Church hopes for the repeal of the prohibition of religious instruction to children, for the grant of legal status to religious associations, for the cessation of sacrilegious treatment of sacred relics and their return to the Church, for the legalization of Church government and State neutrality towards Church elections.'

As a result of the negotiations the supreme governing body of the Church was legalized in Russia and could thenceforth carry on its work openly. True, the persecutions did not cease; other concessions were trivial. But limits were set to the prevailing anarchy which threatened to undermine the life of the Church, and its unity was preserved.

Professor Frank concludes his monograph with the weighty observation that Russian religion, threatened and weakened by State patronage during the last century of the Monarchy, has been strengthened by the healthy internal forces brought into play by the martyrdom to which the Bolshevist régime subjected it.

'Not only are the churches crowded with the faithful of all classes, but devotional life and inner piety have been intensified, and congregational life—albeit not legalized—has developed greatly, as regards charity and brotherly love, in the face of severe privations. This feature was sadly lacking formerly. This purification of religion has also effected a separation, in the consciousness of the faithful, between ecclesiastical, moral, and religious life and the outward life of the State. The faithful keenly desire a genuine separation of Church and State.'

When the doctrinaire Marxist conception of the State has lost its hold on people's minds (which is bound to happen once the spasmodic domination of men's minds characterizing the first period of the Revolution has been passed), the time will have arrived for a juster settlement of the relation of Church and State in Russia.

In the last resort, the idea of the object of the State determines this issue likewise. If the object of the State be the acquisition of as much power as possible, then the Church will be unable to lay claim to independent rights as against the State. But if the object of the State be to create the conditions for a good and beautiful life, then you have an objective basis for an independent right to organize in the interests of the highest possible spiritual, religious, and mental life: to organize a free church in the free State.

The draft of a new Constitution for the Soviet Union again adopts the principles of freedom of conscience for citizens, of the separation of Church and State, of freedom of religious exercise, and of freedom to carry on anti-religious propaganda. It remains to be seen to what extent these principles will be put *into practice*, together with other political rights and democratic institutions such as universal suffrage and the secret ballot, which were likewise proposed and have become law. At all events, in the long run the attitude of intolerance becomes untenable. At the higher stages of culture a more marked differentiation in the sphere of spiritual life simply cannot be avoided. Any state which omits to allow for this, which attempts to oppose by force the development of religious and metaphysical convictions, the free operation and formation of religious communities, mistakes both its own nature and purpose and the effectiveness of such measures as it may employ. Spiritual forces are, in the long run, invincible, because they are sempiternal.

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